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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 682

J. STEVE ANDERSON, PETITIONER,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

No. 683

L. H. PRICHARD, PETITIONER,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 30, 1940.

CERTIORARI GRANTED MARCH 4, 1940.

SUPREME COURT OF THE UNITED STATES

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[fol. a] [Caption omitted]

[fol. 1]

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 86968

J. STEVE ANDERSON, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appearances: For Petitioner: Charles H. Garnett, Esq., For Respondent: Charles P. Reilly, Esq.

DOCKET ENTRIES

1936.

Oct. 19. Petition received and filed. Taxpayer notified. (Fee paid).

Oct. 20. Copy of petition served on General Counsel.

Nov. 17. Answer filed by General Counsel.

Nov. 19. Copy of answer served on taxpayer.

Nov. 30. Motion to place on Circuit Calendar of Oklahoma City, Okla., filed by taxpayer. 11/30/36 granted.

1937.

Sept. 2. Hearing set week of Oct. 18, 1937, Tulsa, Oklahoma.

Oct. 19. Hearing had before Mr. Disney on the merits. Consolidated for hearing and report with dockets 86969 and 86970. Taxpayer's brief due Dec. 18, 1937—respondent's brief due Jan. 18, 1938—taxpayer's reply due Feb. 2, 1938.

Nov. 2. Transcript of hearing Oct. 19, 1937, filed.

1938.

Aug. 16. Memorandum findings of fact and opinion rendered—J. E. Murdock, Division 3. Decision will be entered under Rule 50.

Sept. 7. Computation of deficiency filed by General Counsel.

Sept. 9. Hearing set Sept. 28, 1938, on settlement.

[fol. 2] 1938.

Sept. 15. Motion to vacate memorandum findings of fact and opinion and for reconsideration and redecision of the case, filed by taxpayer. 9/21/38 denied.

Sept. 23. Motion for a continuance until some date after the petitioner's motion for vacating the opinion of the Board and reconsidering and redeciding the case shall have been ruled upon and decided, filed by taxpayer. 9/24/38 denied.

Sept. 28. Hearing had before Mr. Arundell on settlement under Rule 50. Respondent's recomputation not contested. Referred to Mr. Murdock for decision.

Oct. 10. Decision entered—J. E. Murdock, Division 3.

Dec. 30. Petition for review by U. S. Circuit Court of Appeals, Tenth Circuit, with assignments of error filed by taxpayer.

1939.

Jan. 3. Proof of service filed by taxpayer.

Feb. 16. Motion for extension to 4/1/39 to complete and transmit record filed by taxpayer.

Feb. 16. Order enlarging time to 4/1/39 to prepare and transmit record entered.

Mar. 1. Praecipe for record filed by taxpayer with proof of service and agreement endorsed thereon.

BEFORE UNITED STATES BOARD OF TAX APPEALS

PETITION—Filed Oct. 19, 1936

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency dated July 30, 1936, and as a basis of this proceeding alleges as follows:

I

The petitioner is a citizen and resident of the State of Oklahoma and his post office address is Ramsey Tower, Oklahoma City, Oklahoma.

II

The Notice of Deficiency, copy of which is attached hereto and marked Exhibit A, was mailed to the petitioner on July 30, 1936.

[fol. 3] III

The taxes in controversy are income taxes for the calendar year 1932 and the amount involved and in dispute is a deficiency of $2,724.91.

IV

The determination of the deficiency set forth in said Notice of Deficiency is based upon the following errors:

(1) The inclusion in income of alleged profit and income in the sum of $11,276.39, arising out of petitioner's interest in certain property acquired from the Oklahoma City Company in 1931 and owned and operated through 1932 by the Winkler-Koch Royalty Company, a corporation, L. H. Prichard, R. Olsen and petitioner, who are said by the Commissioner to constitute a joint venture, for that petitioner's interest in said joint venture was acquired as compensation for services in 1931, and its then fair market value was its cost, and no income above such cost was realized by him therefrom in 1932.

(2) The inclusion in income of an additional $11,276.39 as petitioner's alleged distributable share in the income and profits of the joint venture referred to in the preceding paragraph, for that, if there were any net profits in said joint venture in which petitioner was entitled to share, the amount thereof was less than that included in income on his return.

(3) The inclusion in income of $3,501.68 alleged to have been the petitioner's distributive share of the net profits of the Prichard-Olsen Joint Venture, for that said joint venture had no profits in said year.

V

The facts upon which the petitioner relies as the basis of this proceeding and in support of the foregoing assignments of error are as follows:

(1) For some time prior to March 19, 1931, L. H. Prichard, a business associate of R. Olsen and petitioner, and acting as agent and trustee for himself and them, carried on negotiations with the Oklahoma City Company, a corporation, of Oklahoma City, Oklahoma for the purchase of a

number of items of property consisting of real estate in fee, royalty interests or mineral rights in real estate, interests in the working interest or leasehold interest in oil and gas [fol. 4] leases, and rights to receive various sums of money to be paid out of oil and gas to be produced from oil and gas properties, being what is commonly known as in-oil payments. All of these parcels and kinds of property were situated in Oklahoma City, in the County and State of Oklahoma, and were generally classed as oil properties, for that they either had or were believed to have oil value. R. Olsen and petitioner were to assist and did assist said L. H. Prichard, who acted as agent and trustee for them as well as for himself, in carrying on said negotiations, and it was understood and agreed among them that whatever contract might be entered into and transactions consummated and properties acquired in the name of L. H. Prichard through such negotiations would belong to the three of them in the proportion of 10% to R. Olsen, 45% to L. H. Prichard, and 45% to petitioner. As a result of the negotiations mentioned, the Oklahoma City Company agreed to sell, convey and assign all the property in question for the consideration of $50,000 to be paid in cash, and $110,000 to be paid with interest out of one-half of the proceeds derived from all oil and or gas produced, saved and sold from the property, and one-half of the proceeds derived from the sale of any part of it. Thereupon L. H. Prichard opened negotiations with the Oil Brokerage and Investment Company, a corporation of Wichita, Kansas, the name of which was later changed to Winkler-Koch Royalty Company already referred to herein, for the purchase by the latter of an interest in said property offered for sale by the Oklahoma City Company. These negotiations resulted in an agreement between L. H. Prichard and said Oil Brokerage and Investment Company that it would pay the $50,000 down payment in cash required to be paid to the Oklahoma City Company, and in consideration thereof should have the right to receive and be paid back that $50,000 out of one-half of any and all revenues of every kind and description that might be realized from the property, and thereafter should receive one-fourth of such revenues until the sum of $110,000 and interest, required to be paid to the Oklahoma City Company in accordance with its proposal out of one-half of all revenues from the property, should be fully

paid from that source, and thereafter should receive one-half of all revenues of every kind and character that might be realized from the property.

On his part, the said L. H. Prichard agreed to consummate the purchase of the property from the Oklahoma City [fol. 5] Company on the terms offered and to take title to it in his name and then to assign to the Oil Brokerage and Investment Company the interest therein that it would be entitled to receive under the agreement with it, and further agreed personally to stand one-half of any loss that it might sustain in event it did not receive back the full $50,000 paid in cash out of the portion assigned to it in the agreement of the revenues from the property. Pursuant to this agreement with the Oil Brokerage and Investment Company, L. H. Prichard, under date of March 19, 1931, entered into a written contract and agreement with the Oklahoma City Company for the purchase of the property in question on the terms previously proposed. Then, under date of March 23, 1931, L. H. Prichard made written assignment to the Oil Brokerage and Investment Company of the interest in the property which it was to acquire under the previous agreement between it and said L. H. Prichard, and also made written assignment to R. Olsen and petitioner of their interests therein. Thereupon the Oil Brokerage and Investment Company paid the $50,000 down payment in cash to the Oklahoma City Company, or to L. H. Prichard for payment to that company, and thereupon the Oklahoma City Company executed and delivered to L. H. Prichard valid instruments conveying to him the various rights and interests in property, and the parcels of property, specified in the contract, together with abstracts of title to the real estate involved and contracts and title papers for the leasehold interests and in-oil payments, and thereupon L. H. Prichard took possession of all of said property and property rights and held the title thereto in trust for himself and for R. Olsen, this petitioner, the Oil Brokerage and Investment Company and the Oklahoma City Company, according to his and their respective interests therein.

Thereafter L. H. Prichard collected all income from the property, sold and conveyed certain portions of it and distributed the revenues and proceeds in accordance with the

rights and interests of the various parties therein as above set forth.

Upon this state of facts, the petitioner says that all and whatever interest was acquired by L. H. Prichard in said property for himself and his said associates, R. Olsen and this petitioner, was received and realized for his services and theirs in negotiating, consummating and carrying out [fol. 6] the said contracts with the Oklahoma City Company and the said contract with the Oil Brokerage and Investment Company, for that he never at any time invested any money or other thing of value of his own or of his said associates, R. Olsen and this petitioner, in the property or the enterprise, or any phase of it, and never agreed, promised or in any way obligated himself to pay any money or thing of value for or on account of the interest which he acquired in said property for himself and his said associates other than that he, for himself and his said associates, agreed to stand one-half of whatever loss the Oil Brokerage and Investment Company might sustain in event it did not receive back the $50,000 cash payment made by it from the source stipulated in the agreement. But this obligation was secondary and contingent, and, because of the known large value and revenue producing character of the property involved, placed no reasonably possible liability on him and his said associates.

If, as the petitioner says, the interest in said property so acquired by L. H. Prichard for himself and R. Olsen and this petitioner was compensation for personal services performed by him and them, or by him for them; then its fair market value at the time acquired was the cost thereof to them. In such event, he and his associates, including this petitioner, would be entitled to have return of their cost in said property before they could have any income or gain therefrom, and the total revenues and income derived from said property during the year 1932 were less than its fair market value, which is the cost of petitioner and associates therein when acquired in 1931. The Commissioner has included the sum of $11,276.39 in petitioner's income as alleged profits accruing to him from said joint venture and coming from said properties. Petitioner says that it is error for the Commissioner to include any part of the revenues and income from the said properties in the year 1932 in his gross income.

(2) By the contract between L. H. Prichard, in his representative capacity as trustee for himself and R. Olsen and this petitioner, and the Oklahoma City Company for the purchase of the property, it is provided that the Company should receive one-half of the proceeds derived from all and every part of the property involved either by income therefrom or gain on the sale thereof until it received the sum of $110,000, with interest thereon at the rate of 6% [fol. 7] per annum from March 19, 1931. The petitioner says that the right to receive this $110,000 represented a retained interest by the Company in the property conveyed and assigned and was in substance and in fact a reserved or excepted interest in the conveyance and assignment thereof to the extent of $110,000. The interest in the property which that $110,000 represented never passed or belonged to or became the property of L. H. Prichard and those whom he represented. None of said sum as derived from said property was his or their income, but at all times was the property and money and income of and belonged to the Oklahoma City Company, and L. H. Prichard, in collecting and receiving it into his hands and paying it over to the Oklahoma City Company, acted as the mere agency or channel through which the Company's retained interest in the property was converted into money and transmitted to it.

The same is true in respect of the $50,000 payment to the Oil Brokerage and Investment Company. The right to receive this sum out of one-half of the first money realized from the property in whatever manner was part of the interest which it purchased from the Oklahoma City Company for $50,000 paid in cash. No part of that $50,000 as realized from the property ever passed or belonged to L. H. Prichard individually or as trustee and agent for R. Olsen and this petitioner or in any way became the money of either of them. In collecting and receiving it into his hands and paying it over to the Oil Brokerage and Investment Company he was merely the agency of that company through which it realized on its right to receive said sum.

During the year 1931 the total revenue and proceeds derived from the property involved was $55,833.17, of which one-half belonged and was paid to and received by the Oklahoma City Company, and the other one-half, less $1,612.49 of expense, was paid to and received by the Oil Brokerage

and Investment Company or its successor, the Winkler-Koch Royalty Company. During the year 1932 the total revenue and proceeds derived from the property was $81,547.15, of which one-half belonged and was paid to and received by the Oklahoma City Company. Out of the remaining one-half, being $40,773.57, there was deducted $713.47 of expense and from the remaining $40,060.11 the Winkler-Koch Royalty Company, successor to the Oil Brokerage and Investment Company, received $23,695.91 to complete the re- [fol. 8] payment to it of the $50,000 with which it had purchased its interest in the property. This left a balance out of said remaining half of $16,364.20, of which 50% went to Winkler-Koch Royalty Company and 22½% was gross income to the petitioner, in event his contention made under assignments of error IV(1) and V(1), supra, is denied and it is determined and held that he had no cost in said property. This amount of gross income would be subject to proper adjustments for depletion, and also, by reason of capital expenditures in development and operation of the property, for depreciation. Upon making these adjustments, the amount of petitioner's net taxable income from said joint venture is determined to be $1,964.93. On his return he included $3,165.19 of income from this source. The Commissioner has included the additional sum of $11,276.39 as income from this source in determining the deficiency here involved. The petitioner says that since he has already overstated such income on his return, the action of the Commissioner in including said additional sum of $11,276.39 as derived from the said joint venture is erroneous.

(3) In 1931 an agreement was made by L. H. Prichard, for himself and as agent and trustee for R. Olsen and petitioner, with a group of persons, fifteen in number and herein referred to as investors, whereby the investors were to furnish L. H. Prichard with money with which to buy oil properties and in-oil payments and were to receive out of the first net income from oil properties or in-oil payments purchased all money furnished by them. Then when they had thus received repayment of all money advanced, the properties and in-oil payments were to belong one-half to the investors, apportioned among them according to the amount of money contributed by each, and one-half to L. H. Prichard, R. Olsen and petitioner, in the proportions of 45%

to L. H. Prichard, 10% to R. Olsen and 45% to petitioner, and L. H. Prichard was to hold the legal title to said properties and in-oil payments in trust for himself and all other parties according to their respective interests therein.

The investors advanced to L. H. Prichard $17,500 for the enterprise, which is termed by the Commissioner the Prichard-Olsen joint venture. During the year 1932 net income from investments of the venture amounted to $15,565.58, according to the Revenue Agent's Report on which the Commissioner's Notice of Deficiency is based in part. This was [fol. 9] all payable and was paid to the investors according to the original agreement and was insufficient to repay the sum advanced by them. The petitioner realized no gain whatever from this source in the taxable year. The Commissioner has included in petitioner's income the sum of $3,501.68, computed at 22½% of $15,565.58, as gain from this venture. The petitioner says that this is erroneous.

VI

The petitioner says that the determination of his income and deductions for the year 1932, as set forth in said Notice of Deficiency, Exhibit A hereto, is correct except in respect of the matters hereinabove alleged to constitute error, and that if and when the errors alleged in this petition are sustained in whole or in part by the decision of the Board, then his tax liability may be ascertained and determined by making whatever corrections or changes, if any, in his net income for said year, as shown by said Notice of Deficiency, may be required by the Board's decision. This may be done under Rule 50.

Wherefore, the petitioner prays that the Board may hear this proceeding and determine that the errors assigned herein are well taken and should be sustained and granted, and that the petitioner's net income and tax liability may be redetermined after a correction of the errors herein assigned in accordance with the decision of the Board in this proceeding.

Chas. H. Garnett, Attorney for Petitioner. 608 Hales Building, Oklahoma City, Oklahoma.

Duly sworn to by J. Steve Anderson. Jurat omitted in printing.

[fol. 10] EXHIBIT "A" TO PETITION

IT:AR:E-1. July 30, 1936.
JF-90D.

Mr. J. Steve Anderson, Ramsey Tower, Oklahoma City, Oklahoma.

SIR:

You are advised that the determination of your income tax liability for the taxable year 1932 discloses a deficiency of $2,724.91 as shown in the statement attached.

In accordance with section 272(a) of the Revenue Act of 1932, as amended by section 501 of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P:7. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully, Guy T. Helvering, Commissioner. By (Signed) W. T. Sherwood, Acting Deputy Commissioner.

Enclosures: Statement Form 870 JF/LEK-1.

[fol. 11] Statement

IT:AR:E-1.
JF-90D.

In re: Mr. J. Steve Anderson,
Ramsey Tower,
Oklahoma City, Oklahoma

Income Tax Liability

Year	Income Tax Liability	Income Tax Assessed	Deficiency
1932	$3,406.00	$681.09	$2,724.91

The report covering the examination of your accounts and records as made by the internal revenue agent in charge, Oklahoma City, Oklahoma, for the year 1932, has been reviewed and approved by this office.

The following changes have been made in your tax liability:

Net income reported on return		$12,184.47
Add:		
1. Income from Joint ventures	$11,612.88	
2. Decrease in loss from sale	8,177.55	19,790.43
Total		$31,974.90
Deduct:		
3. Loss on royalty	$314.09	
4. Contribution deduction increased	1,934.80	2,248.89
Net income adjusted		$29,726.01

Computation of Tax

Net income adjusted		$29,726.01
Less:		
Dividends	$240.00	
Personal exemption	2,500.00	2,740.00
Net income subject to normal tax		$26,986.01
[fol. 12] Normal tax at 4% on $4,000.00		$160.00
Normal tax at 8% on $22,986.01		1,838.88
Surtax on $29,726.01		1,407.12
Total tax assessable		$3,406.00
Tax previously assessed #212507		681.09
Deficiency		$2,724.91

Explanation of Changes.

1. In-oil payments received in connection with the Patterson Deal and oil properties of the Prichard-Olsen Joint Venture not reported have been included as taxable income in accordance with the decision rendered in the Comar Oil Company case, 24 United States Board of Tax Appeals,

688, affirmed in the Circuit Court of Appeals, 64 Fed. (2d) 963.

2. Loss on sale of stocks held for less than two years has been disallowed in accordance with section 23(r) (1) of the Revenue Act of 1932. Loss claimed on sale of Canfield royalty has been disallowed as a transfer of the property was not effected.

3. Income from the Canfield Button royalty has been added and depletion deduction on this royalty allowed on cost has also been taken into consideration in arriving at the revision in income.

4. Contributions have been allowed for the total amount since this deduction is based upon 15 per cent of the net income without the benefit of the deduction.

A letter of final determination is being issued to comply with the request of your attorney, Mr. T. H. Marshall.

A copy of this letter has been mailed to your representative, Mr. T. H. Marshall, 1000 Ramsey Tower, Oklahoma City, Oklahoma, in accordance with the authority contained in the power of attorney executed by you and on file with the Bureau.

[fol. 13] BEFORE UNITED STATES BOARD OF TAX APPEALS

ANSWER—Filed November 17, 1936

Comes Now the respondent by his attorney, Herman Oliphant, General Counsel for the Department of the Treasury, and for answer to the petition of the above-named taxpayer, admits and denies as follows:

I. Admits the allegations contained in Paragraph I of the petition.

II. Admits the allegations contained in Paragraph II of the petition.

III. Admits the allegation contained in Paragraph III of the petition.

IV. (1) to (3), incl. Denies that the Commissioner erred as alleged in sub-paragraphs (1) to (3), inclusive, of Paragraph IV of the petition.

V. (1) to (3), incl. Denies the allegations contained in sub-paragraphs (1) to (3), inclusive, of Paragraph V of the petition.

Denies each and every material allegation of fact contained in the petition not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the taxpayer's appeal be denied.

(Signed) Herman Oliphant, General Counsel for the Department of the Treasury.

Of Counsel: William E. Davis, Stanley B. Anderson, Special Attorneys, Bureau of Internal Revenue.

Received November 17, 1936, United States Board of Tax Appeals.

[fol. 14] BEFORE UNITED STATES BOARD OF TAX APPEALS

Memorandum Findings of Fact and Opinion—August 16, 1938

The Commissioner determined deficiencies in income tax for the calendar year 1932 as follows:

Docket No.	Name	Amount
86968	J. Steve Anderson	$2,724.91
86969	L. H. Prichard	1,918.60
86970	R. Olsen	337.77

The parties filed a stipulation which, as we understand it, disposes of the issue, common to all three proceedings, relating to the proper amount of income to be reported from the so-called Prichard-Olsen Joint Venture. The other issue, common to all three proceedings, is whether the Commissioner erred in including in income for 1932, $11,276.39 in the case of Anderson and Prichard, and $2,505.85 in the case of Olsen, as profits from property acquired from Oklahoma City Company in 1931. An assignment of error in the Olsen case relating to losses was waived by the petitioner with the statement that he had no available evidence. The other assignment of error, also in the Olsen case, challenges the action of the Commissioner in disallowing the deduction

of commissions in the amount of $1,057.25 paid upon the sale of securities, which are alleged to represent ordinary and necessary expenses of a business of buying and selling securities. The last assignment in so far as it related to commissions paid upon purchases, was, apparently, waived. However, if there was no waiver, the result will be the same.

Findings of Fact

The petitioners are individuals who filed their income tax returns for the calendar year 1932 with the Collector of Internal Revenue for the District of Oklahoma. Prichard and Anderson kept books and made their returns upon an accrual basis. Olsen made his return upon the cash basis.

Prichard, after negotiating for several months, entered into a contract with Oklahoma City Company on March 19, 1931, for the acquisition by him of certain royalty interests, fee interests, and deferred oil payments in properties in Oklahoma belonging to the Oklahoma City Company, for $50,000 plus one-half of the proceeds received by Prichard from oil and gas produced from the properties or from sales of the fees until $110,000 is thus paid in addition to the $50,- [fol. 15] 000. Six per cent interest was to be paid, from proceeds of sales or production, upon any unpaid balance of the $110,000 and the seller retained a lien upon the properties and products. The properties were transferred to Prichard immediately.

Prichard, on March 23, 1931, assigned an interest in the properties to Oil Brokerage and Investment Company for $50,000, agreeing that $50,000 should first be paid to Oil Brokerage out of Prichard's share of proceeds under the contract of March 19, 1931, and then Oil Brokerage should have an undivided one-half interest in the properties. If the proceeds failed to pay the $50,000, then Prichard was to pay one-half of the loss. He used the $50,000 obtained from Oil Brokerage to pay on the contract of March 19, 1931.

Prichard, in the above transactions, acted for himself and the other two petitioners, as set forth in a declaration of trust dated March 23, 1931. Their interests were 45 per cent for Prichard, 45 per cent for Anderson, and 10 per cent for Olsen.

The three contracts above referred to are incorporated herein by this reference.

Prichard during 1931 and 1932 received all money representing proceeds from sales and from oil and gas produced from the properties acquired from Oklahoma City Company. He distributed that money in accordance with the various agreements above described. The gross proceeds were $55,833.17 in 1931. Prichard paid that in equal amounts to Oklahoma City Company and Oil Brokerage. Gross proceeds were $81,547.15 in 1932. Prichard distributed one-half thereof to Oklahoma City Company, $23,695.91, plus one-half of the balance, to Oil Brokerage, and the remainder to the three petitioners in the proportions 45, 45, and 10.

Prichard reported as income for 1932 from the above transactions $3,165.19. Anderson reported the same amount. Both deducted depletion. The record does not show what Olsen reported.

The Commissioner, in determining the deficiency against Anderson, added to income reported $11,276.39 as income from the above transactions and gave the following explanation:

> In oil payments received in connection with the Patterson [Oklahoma City Co.] deal * * * not reported have been included as taxable income in accordance with the decision rendered in the Comar Oil Company case, 24 United [fol. 16] States Board of Tax Appeals, 688, affirmed in the Circuit Court of Appeals, 64 Fed. (2d) 963.

He increased the income reported by Prichard in about the same amount on account of royalty income from the above transactions and made an explanation similar to that given Anderson. He increased Olsen's royalty income by $2,505.85 and gave a similar explanation.

OPINION

MURDOCK:

The petitioners requested sixty days after the hearing within which to file a brief. The hearing was held on October 19, 1937. No brief has been filed to date. It may be that the petitioners have become convinced that there is no merit to their contentions. But in any event, we have but a

poor idea of what they contend. The Commissioner treated all receipts less depletion as income, and regarded the disbursements to Oklahoma City Company, and perhaps part of those to Oil Brokerage, as payments of the purchase price of $160,000. We can find no error in this action of the Commissioner. Cf. Comar Oil Co., 24 B. T. A. 688, aff'd 64 Fed. (2d) 965. This case is distinguishable in several important respects from Thomas v. Perkins, 301 U. S. 655, in which the Comar case is mentioned as "in apparent conflict." Payment of the purchase price here was in cash paid by Prichard. Sales of fees were involved. The seller retained a lien. How much of the gross receipts was from sales of fees, how much from oil and gas produced from fees, and how much from royalties on leases is not shown. The record does not justify any change in the Commissioner's determination relating to these items.

There is no evidence in the record to show that Olsen was engaged in any business of buying and selling securities. The only evidence on the subject was the statement of an accountant that Olsen had had about 167 transactions of purchases and sales of securities during 1932. It then developed that the witness had no first hand knowledge of these transactions but was testifying from secondary information. The amount of the commissions was not shown. The circumstances under which they were paid was not shown. The Commissioner, in determining the deficiency, disallowed a deduction in the amount of $2,151.75, and explained his action in part as follows:

[fol. 17] Commissions paid on purchase and sale of securities which reflected a net loss have been disallowed as they are considered an integral part of the transactions resulting in a loss not deductible under section 23(r) of the Revenue Act of 1932.

The record fails to show error in this adjustment.

Decisions will be entered under Rule 50.

PETITIONER'S EXHIBIT #1

Agreement

This agreement made and entered into by and between Oklahoma City Company, a corporation of Oklahoma City, Oklahoma, hereinafter known as party of the first part, and

L. H. Prichard of Oklahoma City, Oklahoma, hereinafter known as party of the second part.

Witnesseth: That, Whereas, the party of the first part is the owner of certain royalty interests, fee ownership and deferred oil payments as indicated in the following described properties situated in Oklahoma County, State of Oklahoma, to-wit:

Shillings Addition
SW¼ 10-11N-3W

Block	Lots	Fee	Royalty
2	11 and 12	None	½
5	32, 33 and 34	None	½
	35 and 36	All	All
11	10	None	½
25	22 and 23	None	½
	24	All	All
30	19 and 20	All	All
33	17 and 18	All	All

Eckroat Addition.
NW¼ 10-11N-3W

14	1, 3, 4, 5, 6, 7, 18, 19, 20, 21, 22, 23, 24, 29 and 30	All	All

[fol. 18]

Terrace Lawn Addition.
NE¼ 10-11N-3W

15	5, 6, 13 and 14	All	All
16	1 to 10 inc., 13 and 14, 19 to 25 inc.	All	All
17	14 to 18 inc.	All	¾
	19 to 28 inc.	All	All
	29 to 32 inc.	All	¾
	33, 43, 46, 47, 48 and 49	All	All
	42	All	⅔
21	1, 2, 9, 10, 15 to 23 inc.	All	All
	41, 42, 45 and 46, 5 and 6	None	½
22	9, 10 and 15 to 22 inc.	All	All
23	1, 2, 5 to 10 inc., 15 to 20 inc., 25, 26, 28, 29, 34, 35, 38 to 42 inc.	All	All
	3 and 4	¾	¾
24	1, 2, 23, 25, 26, 46, 47 and 48	All	¾
30	20, 21, 25 to 28 inc. and 31	All	All
32	3 and 4	All	All
34	17, 18, 25 and 26	All	All
35	3 to 14 inc.	All	All
40	13 and 14	None	½
	15 to 20 inc.	All	All

South Highlands Addition.
NE¼ 10-11N-3W

Block	Lots	Fee	Royalty
7	1 to 6 inc. (Not leased)	All	All
8	3 to 8 inc. (Not leased) 21 to 28 inc. (Not leased)	All	All
18	21 and 22	All	All
26	15 to 18 inc.	None	All
28	1 to 9 inc.	All	All
29	9, 10, 19, 21 and 22	All	All

Whereas, the party of the first part is to receive the sum of $44,431.46 as its proportionate part of ¼th of the ⅞ths of oil and/or gas if and when produced and marketed from Blocks Sixteen (16) and Twenty-three (23), Terrace Lawn Addition, said sum being provided for in an agreement entered into by and between the party of the first part and Anderson-Prichard Oil Corporation and Phillips Petroleum Company, as parties of the second part, and

[fol. 19] Whereas, said party of the first part is to receive the sum of $12,500.00 as its proportionate part of ¼th of ⅞ths of the oil and/or gas if and when produced and marketed from Blocks 34 and 35, Terrace Lawn Addition, in accordance with an agreement entered into between the party of the first part and Skelly Oil Company as party of the second part, and

Whereas, said party of the first part is to receive the sum of $2250.00 as its proportionate part of a total of $17,500.00 to be payable from ¼th of the ⅞ths of the oil and/or gas if and when produced and marketed from Block Thirty (30), Terrace Lawn Addition, which is in accordance with an agreement entered into by and between the party of the first part and the Skelly Oil Company, party of the second part, and

Whereas, the party of the first part shall have and receive the sum of $15,714.27 from its proportionate part of $40,000.00 in oil and/or gas payable from ¼th of the ⅞ths of said production if and when produced from Block Nine (9), South Highlands Addition, it being understood however, between the parties hereto that in the event if for any reason the present lease is released or cancelled without having a well drilled under the said lease, the party of the first part shall not be liable to the party of the second part for the sum above referred to, and

Whereas, the party of the first part is the owner of 11/64ths Working Interest in Blocks 17 and 24 Terrace Lawn Addition to Oklahoma City, which the party of the second part accepts as a part of this transaction, subject only to a provision permitting the operator to deduct from first party's proportionate share of such oil and/or gas if and when produced to reimburse itself for the proportionate part of the cost of drilling and equipping the two wells now completed on said property, the party of the first part hereby agreeing to take care of all other items of expense that may accumulate by reason of other provisions in the operating agreement, for which it is liable thereunder, and in the event the party of the first part should fail to take care of such expenditures, the party of the second part is hereby authorized and directed to deduct such items from the proportionate part of any sum or sums that may be accumulated and become due and payable to the party of the first part under this agreement, and

Whereas, said party of the first part is the owner of a 1/33rd Working Interest in and to the consolidated Blocks [fol. 20] Eighteen (18), Nineteen (19), Twenty (20), Twenty-five (25), Twenty-six (26), Twenty-seven (27), Twenty-eight (28), Twenty-nine (29), South Highlands Addition to Oklahoma City, it being understood between the parties hereto that this Working Interest is a part of an outstanding 3/8ths of the 7/8ths Working Interest covering the above described property, and that a cash bonus of $6,250.00 is chargeable against said interest but is payable only from one-half (½) of 3/8ths of the 7/8ths of said oil and/or gas if and when produced, of which the party of the first part is obligated to pay his proportionate part. In addition thereto, the operator is to receive 6% interest on any money advanced in connection with said operating expense, and

Whereas, the party of the first part represents that a number of wells have been completed and are now producing on various drilling blocks affecting said properties, and the party of the first part further represents that a considerable amount of oil has been accumulated for its benefit, and that there is at this time a considerable sum of money due from various operators, and certain sums of money are due from accumulated deferred lease bonuses, and certain sums of money are due from oil marketed and sold under the varj-

ous oil payments and Working Interests above mentioned, and

Whereas, the party of the first part herein desires to sell all of its right, title and interest of whatsoever nature, together with all of the working interests, deferred lease bonuses, oil payments, royalty interests, fee titles, or any and all other interests in the above described properties, and

Whereas, the party of the second part desires to purchase said interests above described.

Now, Therefore, For and in consideration of the sum of Ten Dollars ($10.00) in hand paid, the receipt of which is hereby acknowledged, and in consideration of the mutual convenants and agreements hereinafter set forth to be kept and performed by the parties hereto, it is agreed as follows:

I

The party of the first part agrees to deliver to the party of the second part good and valid instruments conveying to the party of the second part the various interests referred to, and in addition thereto will deliver abstracts certified to date and certified copies of the various agreements the party [fol. 21] of the first part has entered into between the operators and other parties connected with oil payments and working interests as above mentioned, and upon approval of said abstracts and agreements by the second party's attorneys, the party of the second part agrees to pay to the party of the first part the sum of $50,000.00, $5,000.00 of which is payable to J. M. Field, Jr. as a commission for services rendered, and the party of the first part hereby authorizes and directs the party of the second part to deduct said $5,000.00 from the $50,000.00 herein mentioned, and to pay said sum direct to J. M. Field, Jr., at the time settlement is made upon approval of abstracts and agreements as provided for in this paragraph.

II

The party of the first part agrees that if for any reason it should fail to deliver satisfactory title to any of the lots herein referred to as royalty interests or fee titles, then and in that event it is understood and agreed between the parties hereto that $500.00 per lot shall be deducted from the $110,

000.00, the remainder of the consideration as hereinafter provided for, and the party of the second part is hereby authorized and directed by the party of the first part to deduct such items from the proportionate part of any sum or sums that may accumulate and become due and payable to the party of the first part under this agreement.

III

As a further consideration the party of the first part is to have and receive one-half of the proceeds received by L. H. Prichard which may be derived from all oil and/or gas produced, saved and sold from said above described properties, and shall have and receive one-half of the proceeds derived from the sale of fee title to any or all of the lots conveyed herein, until said party of the first part has received the sum of $110,000.00 in addition to the $50,000.00 hereinabove mentioned. Said $110,000.00 to draw interest at the rate of 6% (Six per cent) per annum from the date of the signing of this agreement, said interest to be paid from the amounts accumulated from the proceeds through sales or production as above mentioned, at which time it is understood and agreed that the party of the first part shall have no further claim to the properties above described, and it is also agreed [fol. 22] that the party of the first part shall have a first lien and claim against that one-half of all oil and gas production and fee interest as above described from which the $110,000.00 is payable as provided for herein, it being understood and agreed that said lien and claim shall not in any way affect the one-half interest in all oil and gas production and fee interest or the revenue therefrom which party of the second part is to have and receive under this agreement. It is further understood between the parties hereto that the party of the first part has entered into an agreement with J. M. Field, Jr., to pay a commission of $7,500.00 to be deducted from the $110,000.00, if and when paid, and the party of the first part hereby authorizes and directs the party of the second part to pay said J. M. Field, Jr., his proportionate part of any and all sums that may be accumulated and collected by L. H. Prichard under the terms as stipulated in this agreement plus the 6% interest as provided for, it being understood that J. M. Field, Jr., at all times shall receive 75/1100 of any amount accumulated and payable to the party of the first part insofar as it covers the $110,000.00.

It being understood and agreed between the parties hereto that any sum or sums accumulating under this agreement is payable direct to the party of the second part or assigns, including such amounts that may become due and payable from pipe line companies purchasing oil and/or gas from said properties, and it is agreed that one-half (½) of such revenues due the party of the first part shall be payable at the end of each ninety days after May 25, 1931, such sums to be placed to the credit of the party of the first part, and said J. M. Field, Jr., as provided for herein, in the Tradesmens National Bank of Oklahoma City, Oklahoma at which time a full, complete, accurate and itemized statement of any oil payments or other revenues shall be submitted, and said Bank is hereby fully authorized and directed by the party of the first part to deliver to the party of the second part good and sufficient receipts for such sums, and it is agreed that a copy of this agreement, with a release from the party of the first part and said J. M. Field, Jr., shall be placed in escrow in said Bank until the sum of $110,000.00 plus interest as provided for, has been paid in full, at which time said Bank is authorized and directed to deliver to the party of the second part the releases attached thereto.

[fol. 23]

IV

It is further understood and agreed between the parties hereto that the party of the first part shall deliver to the party of the second part any sum or sums accumulated to date or to be accumulated from any of said properties or any sum or sums that may accumulate up to the time of delivery of conveyances, division orders and transfer orders necessary to carry out this agreement, and it is understood and agreed that Division Orders, Transfer Orders and any other instruments necessary for the transfer of such funds shall be executed by first party and submitted for the approval and the signature of the party of the second part.

V

It is further understood and agreed between the parties hereto that the party of the first part shall pay to date all ad valorem taxes now due and payable against any or all of the properties herein mentioned, but it is understood and agreed thatt he parties of the second part shall accept said properties with unpaid special taxes now appearing of rec-

ord and under this contract the party of the first part shall not be held for the payment of any such special taxes, and it is agreed that such special taxes shall not at any time interfere with first party's receipt of its fifty per cent (50%) of said oil runs.

This contract shall extend to, inure to the benefit of, and be binding upon the parties hereto and their respective heirs, personal representatives, successors and assigns.

Witness, Our hands and seal this 19th day of March, 1931.

Attest.: (S.) A. R. O'Leary, Secretary.

Oklahoma City Company, by (S.) J. M. Whiteley, President, Party of the First Part. (Seal.) (S.) L. H. Prichard, Party of the Second Part.

STATE OF OKLAHOMA,
Oklahoma County, ss:

Before me, the undersigned, a Notary Public in and for said County and State on this 19th day of March, 1931, personally appeared J. M. Whiteley to me known to be the iden- [fol. 24] tical person who subscribed the name of the maker thereof, Oklahoma City Company, to the foregoing instrument as its President, and acknowledged to me that he executed the same as his free and voluntary act and deed and as the free and voluntary act and deed of such corporation, for the uses and purposes therein set forth.

Given under my hand and seal the day and year last above written. (S.) Louis W. Johnson, Notary Public. My Commission expires June 24th, 1933. (Seal.)

STATE OF OKLAHOMA,
Oklahoma County, ss:

Before me, the undersigned, a Notary Public, in and for said County and State on this 19th day of March, 1931 personally appeared L. H. Prichard, to me known to be the identical person who executed the within and foregoing instrument and acknowledged to me that he executed the same

as his free and voluntary act and *and* deed for the uses and purposes therein set forth.

Given under my hand and seal the day and year last above written. (S.) Elmer H. Wahl, Notary Public. My commission expires March 15, 1935. (Seal.)

PETITIONER'S EXHIBIT #2

Assignment of Interests

Whereas, on the 19th day of March, 1931, a certain agreement was made and entered into by and between Oklahoma City Company, a corporation, referred to as party of the first part, and L. H. Prichard of Oklahoma City, Oklahoma, party of the second part, said agreement covering certain property and varied interests located in Oklahoma County, State of Oklahoma, more particularly described in the attached certified copy of the original agreement, and

Whereas, said contract and all rights thereunder or incident thereto are now owned by L. H. Prichard, subject to the terms and conditions as stipulated in said agreement.

Now, Therefore, for and in consideration of the sum of Fifty Thousand Dollars ($50,000.00), the receipt of which is hereby acknowledged, the undersigned hereby bargains, sells, transfers, assigns and conveys unto The Oil Brokerage [fol. 25] and Investment Company, a Kansas Corporation, an undivided one-half (½) interest in the properties and the various interests described in said agreement, subject to the terms and conditions as provided for therein, it being understood and agreed that said Oil Brokerage and Investment Company, shall have and receive any and all revenues of every kind and description accumulated and received from said properties, payable to said L. H. Prichard as provided for in said agreement, until said Oil Brokerage and Investment Company has received the sum of Fifty Thousand Dollars ($50,000.00), and it is understood and agreed that after said sum has been fully paid, said Oil Brokerage and Investment Company and L. H. Prichard shall each own an undivided one-half (½) interest in said properties, and said L. H. Prichard shall execute and deliver to said Oil Brokerage and Investment Company good and sufficient instruments conveying to said Oil Brokerage and Invest-

ment Company his undivided one-half (½) interest in said properties as referred to in the agreement hereto attached.

It is further understood and agreed between the parties hereto that in the event the revenues from said properties, as provided for in the attached agreement, are not sufficient to reimburse said Oil Brokerage and Investment Company for the Fifty Thousand Dollars ($50,000.00) advanced as a consideration for this assignment, then and in that event, it is understood and agreed between the parties hereto that said L. H. Prichard shall pay one-half (½) of such loss as may be sustained on account of the failure of the described properties to produce sufficient revenue to reimburse said Oil Brokerage and Investment Company for the cash consideration of $50,000.00 as herein provided for.

This Assignment shall extend to, inure to the benefit of, and be binding upon the parties hereto and their respective heirs, personal representatives, successors and assigns.

Witness our hands and seals this 23 day of March, 1931.

(S.) Fred C. Koch, President Oil Brokerage & Investment Co., (S.) L. H. Prichard.

[fol. 26]. PETITIONER'S EXHIBIT #3

Contract and Declaration of Trust

This Agreement made and entered into by and between L. H. Prichard of Oklahoma City, Oklahoma, party of the first part, and J. Steve Anderson and R. Olsen of Oklahoma City, Oklahoma, parties of the second part, Witnesseth:

That, Whereas, on the 19th day of March, 1931, the party of the first part, L. H. Prichard, entered into a certain purchase contract and agreement with the Oklahoma City Company, a corporation, whereby said party of the first part, L. H. Prichard, did purchase certain real estate in fee simple and varied oil royalty and overriding royalty interests, deferred oil payments and working interests in oil leases in certain lands in Oklahoma County, Oklahoma, more particularly described in said contract, a photostatic copy of which is hereto attached, marked Exhibit "A" and made a part hereof as if copies herein in words and figures;

And, Whereas, the consideration of $50,000.00 paid by the said L. H. Prichard for said properties was advanced and

furnished to the said L. H. Prichard by the corporation known as The Oil Brokerage and Investment Company, a Kansas corporation, under an agreement whereby the said The Oil Brokerage and Investment Company should receive all the revenues and proceeds from said properties until and when it should receive reimbursement to the full extent of $50,000.00 so advanced by it as the consideration for said properties, after which reimbursement it was understood that the said The Oil Brokerage and Investment Company and L. H. Prichard should each own a one-half interest in said properties and receive the revenues in such proportion, except that in the event such revenues are not sufficient to reimburse The Oil Brokerage and Investment Company for its advancement of $50,000.00 to the said L. H. Prichard, then the said L. H. Prichard should pay to the said The Oil Brokerage and Investment Company one-half of the loss sustained by reason of the failure of the properties to produce sufficient revenues to reimburse the said The Oil Brokerage and Investment Company for its advancement of $50,000.00, all as more fully provided in that certain contract between The Oil Brokerage and Investment Company and L. H. Prichard dated March 23, 1931, a copy of which [fol. 27] is hereto attached, marked Exhibit "B" and made a part of this contract as if copied herein;

And Whereas, in the purchase of said properties the said L. H. Prichard was not acting for himself alone, but was acting for and on behalf of himself and the undersigned parties of the second part, J. Steven Anderson and R. Olsen, whose interests in said contracts and transactions have not been made known;

Now, Therefore, for the purpose of declaring the respective interests of the several parties hereto in and to the said contracts and all rights accruing thereunder, the undersigned party of the first part, L. H. Prichard, agrees by and with the parties of the second part, J. Steve Anderson and R. Olsen, that he holds the title to said properties and all rights accruing thereunder and under said contracts above set forth in trust for the said J. Steve Anderson, R. Olsen and himself, L. H. Prichard, in the following proportions, to-wit:

L. H. Prichard	Forty-five per cent (45%)
J. Steve Anderson	Forty-five per cent (45%)
R. Olsen	Ten per cent (10%)

all subject to the provisions of the contracts and assignments made pursuant to the original agreements, as hereinabove set forth, with the Oklahoma City Company and The Oil Brokerage and Investment Company.

It is further understood and agreed, however, that should the said L. H. Prichard be called upon under the terms of said contract to bear any loss by reason of the failure of said properties so purchased thereunder to repay or reimburse the said The Oil Brokerage and Investment Company the sum of $50,000.00, the purchase price of said properties, then the parties hereto shall pay such loss so to be borne under the terms of said contract by the said L. H. Prichards in the proportions above set forth.

This contract to be binding upon the heirs, successors, administrators and assigns of the parties hereto.

Witness Our Hands this 23rd day of March, 1931.

(S.) L. H. Prichard, Party of the First Part. (S.) R. Olsen, (S.) J. Steve Anderson, Parties of the Second Part.

[fol. 28] State of Oklahoma,
Oklahoma County, ss:

Before me, the undersigned, a notary public in and for said County and State, on this 23rd day of March, 1931, personally appeared L. H. Prichard, J. Steve Anderson and R. Olsen, to me known to be the identical persons who executed the within and foregoing instrument, and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and official seal the day and year last above written. (S.) Clara D. Johnson, Notary Public. (Seal.) My commission expires June 28, 1932.

Before United States Board of Tax Appeals

Motion of Petitioners for Vacation of Findings of Fact and Opinion and for Reconsideration and Redecision of the Case—Filed September 15, 1938

On August 16, 1938, the Board entered its memorandum findings of fact and opinion in the above entitled cases. The petitioners now move and ask the Board to vacate its

said findings of fact and opinion and reconsider and redecide the cases.

As grounds for their motion they say that the Board in its opinion plainly erred in its statement of the law applicable to the issue of whether oil royalties received by L. H. Prichard as trustee for himself and the other petitioners from properties purchased from the Oklahoma City Company under a contract providing that such royalties should be received by it as part of the consideration for the transfer of such properties was includable in the income of the petitioners, and when paid over to the Oklahoma City Company was to be considered as merely a cash payment by them on the purchase price of the property.

Other issues are raised in the pleadings but the reconsideration and redecision of the cases is not urged on account of them.

Statement in Support of Motion

In the first place, complaint is made in the opinion of the Board that notwithstanding the petitioners took time to file a brief, they never filed any. Commenting on this, the Board says that:

[fol. 29] "It may be that the petitioners have become convinced that there is no merit to their contentions."

We respectfully submit that this conclusion of the Board from the fact of petitioners failure to file a brief is unwarranted. It is the Board's duty to decide cases before it upon the merits of the issues presented in the light of the evidence in the record, whether these issues are briefed or not. The failure to file a brief cannot fairly be considered as a waiver by the petitioners of their contentions or as a confession of lack of merit in them.

It is granted that briefs are or should be helpful to the Board in deciding cases, and that a brief for petitioners should have been filed in these cases. There are several reasons, including an accumulation of misfortunes to petitioners' counsel, which prevented the filing, or at least resulted in the failure to file, a brief on their part. It would not be profitable to enumerate these here; because the Board would doubtless not regard them as any sufficient reason for reconsidering and redeciding the case. But it is emphasized that petitioners not only are not convinced that there is no

merit to their contentions, but are fully convinced that there is merit to their principal one.

Then it is said in the Board's opinion that

"We have but a poor idea of what they contend."

The principal contention is that the amount of in-oil payments received by L. H. Prichard as trustee for petitioners, and by him paid over to the Oklahoma City Company in compliance with the contract between him and that company is not in any part includable in the income of the petitioners. This contention would seem to be quite plainly stated in the second assignment of error and in the statement of facts relied on in support of that assignment as set forth in the petition, and plainly indicated in the opening statement of counsel and in the evidence. Indeed, the Board seems to have understood this contention, for it ruled that the case was distinguished from Thomas vs. Perkins, 301 U. S. 655, in which it is held that a vendor of an oil and gas property who by the terms of the contract of sale is to receive a payment out of part of the oil to be thereafter produced from the property, is the direct recipient of the [fol. 30] amounts applied on such in-oil payment as his income and none of any amount so applied is income to the vendee.

In commenting on the contract in the instant case the Board says that the purchase price here was in cash paid by Prichard. This statement is plainly erroneous, unless the Board takes the view that the moneys applied on in-oil payments to the Oklahoma City Company, because these passed through Prichard's hands before reaching that Company, were first income to him and were his money, and when turned over to the Company were a cash payment on the purchase price. This view is without support in the facts of the case or in the law.

Paragraph III of the contract between the Oklahoma City Company and Prichard provides that the Company was

"to have and receive one-half of the proceeds received by L. H. Prichard which may be derived from all oil and/or gas produced, saved and sold from said above described property,"

and further provides that Prichard was to make quarterly reports of the receipts and place the Company's portion of them to its credit in the bank. The fact that title passed

from the Company to Prichard by proper instruments of conveyance is not material in the light of the decisions. The contract here in this respect is not distinguishable from that in Ortiz Oil Co., 37 B. T. A. 656, in which the Board held that the in-oil payments were not income to the vendee, but were income direct to the vendor.

In Commissioner vs. Fleming (5th C. C. A.), 82 F. (2d) 324 and in Commissioner vs. Williams (5th C. C. A.), 82 F. (2d) 328, the facts were that an owner of an oil and gas lease made an outright sale and conveyance thereof without the retention or reservation of any interest in or lien upon the property conveyed, but with a contract providing that the vendee should "pay" to the vendor certain funds out of a portion of the oil and gas that might thereafter be produced from such property.

Neither are the provisions of the contract in the instant case different in any material respect from that involved in Palmer vs. Bender, 287 U. S. 551. That case holds that the recipient of the oil payment is entitled to the depletion de-
[fol. 31] duction thereon. This holding necessarily makes the in-oil payment income to the recipient and excludes it from income of the vendee of the property. There cannot be two allowances of depletion on the same income, and the in-oil payment could not be included in income of the vendee without allowing him a deduction for depletion thereon. Helvering vs. Twin Bell Oil Syndicate, 293 U. S. 312.

So we say that the holding of the Board in its opinion in the instant case that the in-oil payments in controversy were income to the petitioners first, and when paid to the Oklahoma City Company, were a cash payment by them on the purchase price of the property is contrary to settled authority. We do not see how it could be seriously contended that the Company would be denied a depletion deduction on the in-oil payments which it received. If so, these payments could not be income to the petitioners.

But the Board says that

"Sales of fees were involved. The seller retained a lien."

The Board does not indicate what effect in its view the retention of a lien on the property would have, and we know of no holding that the retention of a lien on oil and gas property sold to secure an in-oil payment or to secure payment

of the purchase price would take the transaction out of the rule laid down in the cases above cited. It does not appear from the record that sales of fees were involved, but if they were, still the proceeds of such sales were not income to or received by the petitioners through Prichard as their trustee, but these proceeds represented a retained interest in the property by the vendor under the terms of the contract of sale. Under that contract it was not possible for there to be any income to Prichard from one-half of the gross realization in whatever manner from the property until the Oklahoma City Company had received the sum which it was to receive out of one-half of all realization therefrom.

For the reasons and on the grounds above set forth the petitioners respectfully pray that the Board vacate its findings and opinion herein and reconsider and redecide the cases by holding that the entire amount of in-oil payments as shown in each case by the notice of deficiency attached [fol. 32] to the petition therein, is excluded from income of the petitioner in such case.

Chas. H. Garnett, 608 Hales Building, Oklahoma City, Oklahoma, Attorney for Petitioners.

Denied September 21, 1938. (s) J. E. Murdock, Member U. S. Board of Tax Appeals.

BEFORE UNITED STATES BOARD OF TAX APPEALS

DECISION

Pursuant to the Board's Memorandum Findings of Fact and Opinion entered August 16, 1938, the respondent, on September 7, 1938, filed a proposed computation which was not contested by the petitioner at the hearing on September 28, 1938. Therefore, it is

Ordered and Decided, that there is a deficiency for 1932 in the amount of $2,637.41.

(Signed) J. E. Murdock, Member, United States Board of Tax Appeals. (Seal.)

Entered October 10, 1938.

IN UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

PETITION FOR REVIEW OF FINDINGS OF FACT, OPINION, DECISION AND JUDGMENT OF UNITED STATES BOARD OF TAX APPEALS IN THE CASE OF J. STEVE ANDERSON VS. COMMISSIONER OF INTERNAL REVENUE, RESPONDENT, B. T. A. DOCKET NO. 86,968—Filed December 30, 1938

To the Honorable Judges of the United States Circuit Court of Appeals for the Tenth Circuit:

Now comes J. Steve Anderson by Chas. H. Garnett, his attorney, and respectfully shows unto the court that:

I

The petitioner, herein sometimes referred to as the taxpayer, is a citizen and resident of Oklahoma County in the State of Oklahoma and his address is Ramsey Tower, Oklahoma City, Oklahoma.

The respondent is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States. [fol. 33] Guy T. Helvering, herein sometimes referred to as the Commissioner.

The taxpayer filed his income tax return for the calendar year 1932 with the Collector of Internal Revenue for the District of Oklahoma, whose office is located within the judicial circuit of the United States Circuit Court of Appeals for the Tenth Circuit wherein the taxpayer also resides.

II

The Commissioner determined a deficiency in income taxes against the taxpayer of $2,724.91 for the year 1932 and on July 30, 1936, in accordance with the provisions of the applicable statute, sent the taxpayer by registered mail a notice of said deficiency.

Within ninety days thereafter the taxpayer filed his appeal, in the form of a petition for review of the determination of said deficiency as set forth in said notice of deficiency, with the United States Board of Tax Appeals. The case was in due course tried before the Board and submitted for its decision, and on August 16, 1938, the Board promulgated its findings of fact and opinion therein, and on October 10, 1938, entered its judgment and final order of re-

determination wherein and whereby it ordered and decided that there was a deficiency of $2,637.41 in the taxpayer's income tax for 1932.

III

The determination by the Commissioner of the deficiency in taxpayer's income tax for 1932 arose out of and was based upon the following briefly outlined state of facts:

In 1931 L. H. Prichard, acting for himself and R. Olsen and the petitioner jointly, contracted to purchase and purchased from Oklahoma City Company, a corporation, certain property and property rights consisting of fee title to real estate, oil and gas royalty interests in real estate and the right to receive in-oil payments out of oil and gas production from real estate, according to the terms and conditions of a written contract, to which reference may be made for a fuller statement. The title to the property and property rights thus acquired was taken and held by Prichard in the proportion of 45% to himself, 45% to petitioner, and [fol. 34] 10% to Olsen, according to a written agreement between them. The contract for the purchase of the property and property rights provided for payment of a cash consideration of $50,000 and that the seller should receive one-half of all proceeds derived from oil and gas produced from the property or from the sale of fee title to any of the real estate until it had received the additional sum of $110,000 with 6% interest thereon from the date of the contract, and that the seller should have a first lien and claim against one-half of all of the oil and gas production and the fee interest in the real estate from the proceeds of which said sum was payable until it was fully paid.

During 1932 the gross sum of $81,547.15 was received by Prichard from oil and gas production and in-oil payments from the property, and one-half thereof was paid to Oklahoma City Company in accordance with the terms of the contract. No part of the sum paid over to Oklahoma City Company was included in income on petitioner's tax return. The Commissioner determined that all of the $81,547.15 was gross income to Prichard, Olsen and petitioner in the proportions stated above, and included the petitioner's proportion thereof in his income and based the determination of a deficiency in tax thereon.

At the time Prichard was negotiating with Oklahoma City Company for the purchase of the property and property

rights in question, he was also negotiating with Oil Brokerage and Investment Company, a corporation, the name of which was later changed to Winkler-Koch Company, for the purchase by it of an interest therein. These negotiations resulted in the sale and assignment to Oil Brokerage Company of a half interest in all of the property and property rights acquired by Prichard from Oklahoma City Company, subject to the terms and conditions of his contract with that company, for the price and consideration of $50,000 in cash, but with the provision that Oil Brokerage Company should have and receive all revenues of every kind realized from the property which were payable to him under his agreement with Oklahoma City Company until it had received $50,000, and with the further provision that in event it failed to receive full $50,000 from such revenues, then Prichard would pay half of its loss.

In 1931 Oil Brokerage Company received part of the [fol. 35] $50,000 from the specified revenues and in 1932 received the final payment thereon of $23,695.91. The petitioner did not include in income on his tax return any part of the above amount paid to Oil Brokerage Company. The Commissioner in determining the deficiency involved included 45% thereof in petitioner's income.

After Oil Brokerage Company had received the final payment of $23,695.91 out of the specified revenues purchased under its contract, there remained the sum of $16,364.20 out of the half of the proceeds derived from the properties in 1932 which went to Prichard under his contract with Oklahoma City Company. One-half of this, or $8,182.10, was paid to Oil Brokerage Company, and the other half was divided among Prichard, Olsen and petitioner in the agreed percentages. The petitioner did not include in income on his tax return any part of the above sum of $8,182.10 payable and paid to Oil Brokerage Company, but did include 45% of the like sum divided among Prichard, Olsen and himself. The Commissioner in determining the deficiency involved included 45% of said sum of $8,182.10 paid to Oil Brokerage Company in petitioner's income.

The action of the Commissioner in including in petitioner's income 45% of the payments of money derived from the properties involved which were retained by and payable to Oklahoma City Company and those which were acquired by and payable to Oil Brokerage Company was assigned as error by the petitioner before the Board of Tax Appeals.

In the findings of fact, opinion and final decision of the Board above referred to, the Commissioner's contention is upheld and all of the income from the property and property rights involved during 1932 is deemed and held to be income to Prichard, Olsen and petitioner in the percentages above mentioned, and the deficiency in tax adjudged against petitioner for said year is based thereon.

IV

The petitioner says that in the record and proceedings before the Board of Tax Appeals and in its opinion, decision and final order of redetermination as rendered and entered, manifest error occurred and intervened to the prejudice of the petitioner, and he assigns the following errors and each of them and avers that these occurred in the [fol. 36] said record, proceedings, findings of fact, opinion, decision and final order of redetermination, and that upon these he relies to reverse the said decision and final order of redetermination so rendered and entered by the Board of Tax Appeals, to-wit:

(1) The Board of Tax Appeals erred in that its findings of fact in respect of the source from which derived, the ownership, apportionment and payment over of the gross proceeds derived and realized from said property and property rights in 1932 is not supported by any evidence in the record and is contrary to the evidence.

(2) The Board of Tax Appeals erred in holding that the half of the gross proceeds derived and realized in 1932 from oil and gas production and from in-oil payments from the property and property rights involved which was payable and was paid to Oklahoma City Company was income to Prichard, Olsen and petitioner.

(3) The Board of Tax Appeals erred in refusing to hold that no part of the gross proceeds realized and derived in 1932 from the property and property rights involved which were payable and were paid to Oklahoma City Company was income to Prichard, or Olsen or petitioner or any of them.

(4) The Board of Tax Appeals erred in holding that that part of the half of the gross proceeds derived and realized from said property and property rights in 1932 and which were paid to Oil Brokerage Company in final payment of the

$50,000 due it by contract, was income to Prichard, Olsen and petitioner.

(5) The Board of Tax Appeals erred in refusing to hold that no part of the gross proceeds derived and realized from said property and property rights in 1932 which were payable and were paid to Oil Brokerage Company in final payment of the $50,000 due it by contract was income to Prichard or Olsen or petitioner or any of them.

(6) The Board of Tax Appeals erred in holding that all of the half of the gross proceeds derived and realized from said property and property rights in 1932 remaining after Oil Brokerage Company had received payment in full of the $50,000 payable to it by contract out of such one-half thereof, was income to Prichard, Olsen and petitioner.

[fol. 37] (7) The Board of Tax Appeals erred in refusing to hold that only one-half of that part of the half of the gross proceeds derived and realized from said property and property rights in 1932 remaining after Oil Brokerage Company had been paid in full the $50,000 payable to it therefrom by contract was income to Prichard or Olsen or petitioner or any of them.

(8) The Board of Tax Appeals erred in determining that there was a deficiency in petitioner's income tax for the year 1932 in the amount of $2,637.41, and rendering a judgment therefor.

(9) The Board of Tax Appeals erred in not determining and adjudging that there was no deficiency in petitioner's income tax for 1932.

Wherefore, the petitioner asks that a transcript of the proceedings before the Board of Tax Appeals be prepared in accordance with law and the rules of the United States Circuit Court of Appeals for the Tenth Circuit and transmitted to the clerk of said court for filing; that appropriate action be taken by said court to the end that the errors complained of herein may be reviewed and corrected; that the said decision of the said Board be reversed and set aside and the cause remanded to the Board with directions to conform its final order, decision and judgment to the law applicable as declared by said court; and that the petitioner

have such further or other and different relief in the premises as shall be lawful, just and proper.

Chas. H. Garnett, 608 Hales Building, Oklahoma City, Oklahoma, Attorney for Petitioner.

Duly sworn to by Chas. H. Garnett. Jurat omitted in printing.

[fol. 38] BEFORE UNITED STATES BOARD OF TAX APPEALS

NOTICE OF FILING PETITION FOR REVIEW—Filed January 3, 1939

To Guy T. Helvering, Commissioner of Internal Revenue of the United States, and J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue:

You, and each of you, are hereby notified that the petitioner above named did on the 30th day of December, 1938, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Tenth Circuit, of the decision of the Board heretofore rendered in the above entitled case. A copy of said petition for review and the assignments of error thereon, as so filed, is hereto attached and served upon you with this notice.

Dated this 31st day of December, 1938.

Chas. H. Garnett, Attorney for Petitioner.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby accepted and acknowledged this 3rd day of January, 1939.

J. P. Wenchell, Chief Counsel, Bureau of Internal Revenue.

BEFORE UNITED STATES BOARD OF TAX APPEALS

PRAECIPE FOR RECORD—Filed March 1, 1939

To the Clerk of the United States Board of Tax Appeals:

You are hereby requested to prepare, certify and transmit to the Clerk of the United States Circuit Court of Appeals

for the Tenth Circuit at Denver, Colorado, prior to April 1, 1939, a transcript of the record in the above cause, said date being the time to which the filing of such transcript in said court has been extended, to be prepared and transmitted as required by law and by the rules of said court, and [fols. 39-40] to include in said transcript of record the following documents or certified copies thereof, to-wit:

1. The docket entries of all proceedings before the Board of Tax Appeals.

2. The pleadings of both parties before the Board of Tax Appeals.

3. The opinion of the Board of Tax Appeals, together with copies of the exhibits therein referred to and by reference made a part thereof.

4. The motion of petitioner for vacation of findings of fact and opinion of the Board and for reconsideration and redecision of the case, and order of the Board denying such motion.

5. The decision of the Board.

6. The petition for review filed by the petitioner in the above cause.

7. The order enlarging time for the preparation, transmission and delivery of the record to the Circuit Court of Appeals. Not included in record.

8. This praecipe.

Chas. H. Garnett, Attorney for Petitioner, 608 Hales Building, Oklahoma City, Oklahoma.

Service of this praecipe is accepted and acknowledged this 1st day of March, 1939, and the same is hereby agreed to.

J. P. Wenchell, Chief Counsel, Bureau of Internal Revenue, Attorney for Respondent.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 41] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 86969

L. H. PRICHARD, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

(Appearances and docket entries appear in identical form at page 1, of the printed record and are therefore omitted here.)

PETITION—Filed October 19, 1936

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency dated July 30, 1936, and as a basis of this proceeding alleges as follows:

I

The petitioner is a citizen and resident of the State of Oklahoma, and his post office address is Ramsey Tower, Oklahoma City, Oklahoma.

II

The Notice of Deficiency, copy of which is attached hereto and marked Exhibit A, was mailed to the petitioner on July 30, 1936.

III

The taxes in controversy are income taxes for the calendar year 1932, and the amount involved and in dispute is a deficiency of $1,918.60.

IV

The determination of the deficiency set forth in said Notice of Deficiency is based upon the following errors:

(1) The inclusion in income of alleged profits and income arising out of petitioner's interest in certain property acquired from The Oklahoma City Company in 1931 and [fol. 42] owned and operated throughout 1932 by Winkler-Koch Royalty Company, a corporation, J. Steve Anderson, R. Olsen, and petitioner, who are said by the Commissioner to constitute a joint venture, for that petitioner's interest in said joint venture was acquired as compensation for serv-

ices in 1931, and its then fair market value was its cost, and no income above such cost was realized by him therefrom in 1932.

(2) The inclusion in income of an additional $11,276.39 to petitioner's alleged distributive share in the income and profits of the joint venture referred to in the preceding paragraph, for that, if there were any net profits in said joint venture in which petitioner was entitled to share, the amount thereof was less than that included in income on his return.

(3) The inclusion in income of $3,501.68 alleged to have been the petitioner's distributive share of the net profits of Prichard-Olsen joint venture, for that said joint venture had no profits in said year.

V

The facts upon which the petitioner relies as the basis of this proceeding and in support of the foregoing assignments of error are as follows:

(1) For some time prior to March 19, 1931, the petitioner carried on negotiations with The Oklahoma City Company, a corporation, of Oklahoma City, Oklahoma, for the purchase of a number of items of property consisting of real estate in fee, royalty interests or mineral rights in real estate, interests in the working interest or leasehold interest in oil and gas leases, and rights to receive various sums of money to be paid out of oil and gas to be produced from oil and gas properties, being what is commonly known as in-oil payments. All of these parcels and kinds of property were situated in Oklahoma City, in the County and State of Oklahoma, and were generally classed as oil properties, for that they either had or were believed to have oil value. In carrying on these negotiations, the petitioner was assisted by his business associates, J. Steve Anderson and R. Olsen, and represented and acted for them as well as himself, and it was understood and agreed among them that whatever contract might be entered into and transaction consummated and property acquired in the name of the petitioner through such negotiations would belong to the three of them in the proportion of 45% to J. Steve Anderson, 45% to petitioner, and 10% to R. Olsen. As a result of the negotiations [fol. 43] mentioned the Oklahoma City Company agreed to sell, convey and assign all the property in question for the

consideration of $50,000 to be paid in cash and $110,000 to be paid with interest out of one-half of the proceeds to be derived from all oil and/or gas produced, saved and sold from the property and one-half of the proceeds that might be derived from the sale of any part of it.

Thereupon the petitioner opened negotiations with the Oil Brokerage and Investment Company, a corporation, of Wichita, Kansas, the name of which was later changed to the Winkler-Koch Royalty Company already referred to herein, for the purchase by the latter of an interest in said property offered for sale by the Oklahoma City Company. These negotiations resulted in an oral agreement between him and said Oil Brokerage and Investment Company that it would pay the $50,000 down payment in cash required to be paid to the Oklahoma City Company, and in consideration thereof should have the right to receive and be paid back that $50,000 out of one-half of any and all revenues of every kind and description that might be realized from the property, and thereafter should receive one-fourth of such revenues until the sum of $110,000 to be paid to the Oklahoma City Company in accordance with its proposal out of one-half of all revenues from the property, should be fully paid from that source, and thereafter should receive one-half of all revenues of every kind and character that might be realized from the property.

On his part, the petitioner agreed to consummate the purchase of the property from the Oklahoma City Company on the terms offered and to take title to it in his name, and then to assign to the Oil Brokerage and Investment Company the interest therein that it would be entitled to receive under his agreement with it, and further agreed personally to stand one-half of any loss that it might sustain in event it did not receive back the full $50,000 paid in cash out of the portion assigned to it in the agreement of the revenues from the property.

Pursuant to this agreement with the Oil Brokerage and Investment Company, petitioner, under date of March 19, 1931, entered into a written contract and agreement with the Oklahoma City Company for the purchase of the property in question on the terms previously proposed. Then, under date of March 23, 1931, petitioner made written as- [fol. 44] signment to the Oil Brokerage & Investment Company of the interest in the property which it was to acquire under the previous agreement between it and petitioner, and

also made written assignment to J. Steve Anderson and R. Olsen of their interests therein. Thereupon the Oil Brokerage & Investment Company paid the $50,000 down payment in cash to the Oklahoma City Company or the petitioner for payment to that Company, and thereupon the Oklahoma City Company executed and delivered to petitioner valid instruments conveying to him the various rights and interests in property and the parcels of property specified in the contract, together with abstracts of title to the real estate involved and contracts and title papers for the leasehold interests and in-oil payments, and thereupon the petitioner took possession of all of said property and property rights and held the title thereto in trust for himself and for said J. Steve Anderson, R. Olsen, the Oil Brokerage & Investment Company, and the Oklahoma City Company, according to his and their respective interests therein.

Thereafter petitioner collected all income from the property, sold and conveyed certain portions of the property, and distributed the revenues and proceeds in accordance with the rights and interests of the various parties therein as above set forth.

Upon this state of facts, the petitioner says that all and whatever interest was acquired by him in said property for himself and his said associates, J. Steve Anderson and R. Olsen, was received and realized for his services in negotiating, consummating and carrying out the said contracts with the Oklahoma City Company and the said contract with the Oil Brokerage & Investment Company, for that he never at any time invested any money or other thing of value of his own or of his said associates in the property or the enterprise, or any phase of it, and never agreed, promised, or in any way obligated himself to pay any money or thing of value for or on account of the interest which he acquired in said property for himself and his associates, other than that he agreed to stand one-half of whatever loss the Oil Brokerage & Investment Company might sustain in event it did not receive back the $50,000 cash payment made by it from the source stipulated in the agreement. But this obligation was secondary and contingent and, because of the [fol. 45] known large value and revenue producing character of the property involved, placed no reasonably possible liability on him.

If, as the petitioner says, the interest in said property so acquired by him and his associates was compensation for personal services, then its fair market value at the time acquired was the cost thereof to them.

In such event, he and his associates would be entitled to have return of their cost in said property before they could have any income or gain therefrom, and the total revenues and income derived from said property during the year 1932 was less than its fair market value, being petitioner's cost therein, when acquired in 1931. Petitioner says therefore that it is error for the Commissioner to include any part of the revenues and income from said properties in the year 1932 in his gross income.

(2) By the contract between the petitioner in his representative capacity as trustee for himself and others and the Oklahoma City Company for the purchase of the property, it is provided that the Company shall receive one-half of the proceeds derived from all and every part of the property involved, either by income therefrom or gain on the sale thereof, until it had received the sum of $110,000, with interest thereon at the rate of six per cent (6%) per annum from March 19, 1931. The petitioner says that the right to receive this $110,000 represented a retained interest by the Company in the property conveyed and assigned, and was in substance and in fact a reserved or excepted interest in the conveyance and assignment thereof to the extent of $110,000. The interest in the property which that $110,000 represented never passed or belonged to or became the property of the petitioner and those whom he represented. None of said sum as derived from said property was his income, but at all times was the property and money and income of and belonged to the Oklahoma City Company, and petitioner, in collecting and receiving it into his hands and paying it over to the Oklahoma City Company, acted as the mere agency or channel through which the Company's retained interest in the property was converted into money and transmitted to it.

The same is true in respect of the $50,000 payment to the Oil Brokerage and Investment Company. The right to receive this sum out of one-half of the first money realized [fol. 46] from the property in whatever manner was part of the interest which it purchased from the Oklahoma City

Company for $50,000 paid in cash. No part of that $50,000 as realized from the property ever passed or belonged to the petitioner or in any way became his money. In collecting and receiving it into his hands and paying it over to the Oil Brokerage and Investment Company, he was merely the agency of that company through which it realized on its right to receive said sum.

During the year 1931 the total revenue and proceeds derived from the property involved was $55,833.17, of which one-half belonged and was paid to and received by the Oklahoma City Company, and the other one-half, less $1,612.49 of expense, was paid to and received by the Oil Brokerage and Investment Company, or its successor, the Winkler-Koch Royalty Company. During the year 1932 the total revenue and proceeds derived from the property was $81,547.15, of which one half belonged and was paid to and received by the Oklahoma City Company. Out of the remaining one half, being $40,773.57, there was deducted $713.47 of expense and from the remaining $40,060.11, the Winkler-Koch Royalty Company, successor to the Oil Brokerage and Investment Company, received $23,695.91 to complete the repayment to it of the $50,000 with which it had purchased its interest in the property. This left a balance out of said remaining half of $16,364.20, of which 50% went to Winkler-Koch Royalty Company, and 22½% was gross income to the petitioner, in event his contention made under assignment of error IV (1) and V (1), supra, is denied and it is determined and held that he had no cost in said property. This amount of gross income would be subject to proper adjustments for depletion and also, by reason of capital expenditures in development and operation of the property, for depreciation. Upon making these adjustments, the amount of petitioner's net taxable income from said joint venture is determined to be $1,964.93. On his return he included $2,887.29 of income from this source. Therefore, since he has already overstated said income on his return, the action of the Commissioner in including said additional sum of $11,276.39 as derived from the said joint venture is erroneous.

(3) In 1931 an agreement was made by petitioner for himself and as agent for J. Steve Anderson and R. Olsen [fol. 47] with a group of persons, fifteen in number and herein referred to as investors, whereby the investors were to furnish him money with which to buy oil properties and

in-oil payments and were to receive out of the first net income from properties or in-oil payments purchased all money furnished by them. Then when they had thus received repayment of all money advanced the properties and in-oil payments were to belong one-half to the investors, apportioned among them according to the amount of money contributed by each, and one-half to petitioner, J. Steve Anderson and R. Olsen in the proportions of 45% to petitioner, 45% to J. Steve Anderson, and 10% to R. Olsen, and petitioner was to hold the legal title to said properties and in-oil payments in trust for all the other parties according to their respective interests therein.

The investors advanced to the petitioner $17,500.00 for the enterprise, which is termed by the Commissioner the Prichard-Olsen Joint Venture. During the year 1932 net income from investments of the venture amounted to $15,565.58, according to the Revenue Agent's report on which the Commissioner's Notice of Deficiency is based in part. This was all payable and was paid to the investors, according to the original agreement, and was insufficient to repay the sum advanced by them. The petitioner realized no gain whatever from this source in the taxable year. The action of the respondent in including in his income the sum of $3,501.68, computed as 22½% of $15,565.58, as gain from this venture is erroneous.

VI

The petitioner says that the determination of his income and deductions for the year 1932, as set forth in said Notice of Deficiency, Exhibit A hereto, is correct except in respect of the matters hereinabove alleged to constitute error, and that if and when the errors alleged in this petition are sustained in whole or in part by the decision of the Board, then his tax liability may be ascertained and determined by making whatever corrections or changes, if any, in his net income for said year as shown by said Notice of Deficiency may be required by the Board's decision. This may be done under Rule 50.

Wherefore, the petitioner prays that the Board may hear this proceeding and determine that the errors assigned herein are well taken and should be sustained and granted, [fol. 48] and that the petitioner's net income and tax liability may be redetermined after a correction of the errors

herein assigned in accordance with the decision of the Board in this proceeding.

Chas. H. Garnett, Attorney for Petitioner, 608 Hales Building, Oklahoma City, Oklahoma.

Duly sworn to by L. H. Prichard. Jurat omitted in printing.

EXHIBIT "A" TO PETITION

Jul. 30, 1936.

IT:AR:E-1.
JF-90D.

Mr. L. H. Prichard, Ramsey Tower, Oklahoma City, Oklahoma.

SIR:

You are advised that the determination of your income tax liability for the taxable year 1932 discloses a deficiency of $1,918.60 as shown in the statement attached.

In accordance with section 272(a) of the Revenue Act of 1932, as amended by section 501 of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested [fol. 49] to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully, Guy T. Helvering, Commissioner, by (Signed) W. T. Sherwood, Acting Deputy Commissioner.

Enclosures: Statement, Form 870.

JF/LEK-1.

Statement

IT:AR:E-1

In re Mr. L. H. Prichard, Ramsey Tower, Oklahoma City, Oklahoma

Income Tax Liability

Year	Income Tax Liability	Income Tax Assessed	Deficiency
1932	$3,111.47	$1,192.87	$1,918.60

The report covering the examination of your accounts and records as made by the internal revenue agent in charge, Oklahoma City, Oklahoma, for the year 1932, has been reviewed and approved by this office.

The following changes have been made in your tax liability:

Net income reported on return		$16,711.50
Add:		
1. Increase in royalty income		12,684.78
Total		$29,396.28
Deduct:		
2. Depletion on Canfield royalty	$355.51	
3. Increase in contributions	563.41	
		918.92
Net income adjusted		$28,477.36

Computation of Tax

Net income adjusted		$28,477.36
Less:		
Personal exemption and credit for dependents		3,300.00
Net income subject to normal tax		$25,177.36
Normal tax at 4% on $4,000.00		$160.00
Normal tax at 8% on $21,177.36		1,694.19
Surtax on $28,477.36		1,257.28
		$3,111.47
Total tax, account 212508	$1,168.50	
Tax previously assessed May, 1934—510047	24.37	
		1,192.87
Deficiency		$1,918.60

Explanation of Changes

1. In-oil payments received in connection with the Patterson Deal and oil properties of the Prichard-Olsen Joint Venture not reported have been included as taxable income in accordance with the decision rendered in the Comar Oil Company case, 24 United States Board of Tax Appeals, 688, affirmed in the Circuit Court of Appeals, 64 Fed. (2d) 963.

2. Depletion based on cost has been allowed on the Canfield Button royalty.

3. Contribution deduction, based on 15 per cent of the net income without the benefit of the deduction, has been increased because of the increase in income.

A letter of final determination is being issued to comply with the request of your attorney, Mr. T. H. Marshall.

[fol. 50] A copy of this letter has been mailed to your representative, Mr. T. H. Marshall, 1000 Ramsey Tower, Oklahoma City, Oklahoma, in accordance with the authority contained in the power of attorney executed by you and on file with the Bureau.

[fol. 51] Before United States Board of Tax Appeals

Answer—Filed Nov. 17, 1936

Comes Now the respondent by his attorney, Herman Oliphant, General Counsel for the Department of the Treasury, and for answer to the petition of the above-named taxpayer, admits and denies as follows:

I. Admits the allegations contained in Paragraph I of the petition.

II. Admits the allegations contained in Paragraph II of the petition.

III. Admits the allegations contained in Paragraph III of the petition.

IV. (1) to (3), incl. Denies that the Commissioner erred as alleged in sub-paragraphs (1) to (3), inclusive, of Paragraph IV of the petition.

V. (1) to (3), incl. Denies the allegations contained in sub-paragraphs (1) to (3), inclusive, of Paragraph V of the petition.

Denies each and every material allegation of fact contained in the petition not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the taxpayer's appeal be denied.

(Signed) Herman Oliphant, General Counsel for the Department of the Treasury. Of Counsel: William E. Davis, Stanley B. Anderson, Special Attorneys, Bureau of Internal Revenue.

Received November 17, 1936. U. S. Board of Tax Appeals.

[Memorandum findings of fact and opinion and petitioner's exhibits 1, 2 and 3 appear in identical form at page 14 of the printed record and are therefore omitted here.]

[fol. 52] [Petitioner's motion for vacation of findings of fact and opinion and for reconsideration and redecision appears in identical form at page 28 of the printed record and is therefore omitted here.]

BEFORE UNITED STATES BOARD OF TAX APPEALS

DECISION

Pursuant to the Board's Memorandum Findings of Fact and Opinion entered August 16, 1938, the respondent, on September 7, 1938, filed a proposed computation which was not contested by the petitioner at the hearing on September 28, 1938. Therefore, it is

Ordered and Decided, that there is a deficiency for the year 1932 in the amount of $1,831.10.

(Signed) J. E. Murdock, Member, United States Board of Tax Appeals.

Entered Oct. 10, 1938.

IN UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

PETITION FOR REVIEW OF FINDINGS OF FACT, OPINION, DECISION AND JUDGMENT OF UNITED STATES BOARD OF TAX APPEALS IN THE CASE OF L. H. PRICHARD VS. COMMISSIONER OF INTERNAL REVENUE, RESPONDENT, B. T. A. DOCKET NO. 86,969—Filed Dec. 30, 1938

To the Honorable Judges of the United States Circuit Court of Appeals for the Tenth Circuit:

Now comes L. H. Prichard by Chas. H. Garnett, his attorney, and respectfully shows unto the court that:

I

The petitioner, herein sometimes referred to as the taxpayer, is a citizen and resident of Oklahoma County in the State of Oklahoma and his address is Ramsey Tower, Oklahoma City, Oklahoma.

The respondent is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, Guy T. Helvering, herein sometimes referred to as the Commissioner.

The taxpayer filed his income tax return for the calendar year 1932 with the Collector of Internal Revenue for the District of Oklahoma, whose office is located within the judi- [fol. 53] cial circuit of the United *of the United* States Circuit Court of Appeals for the Tenth Circuit wherein the taxpayer also resides.

II

The Commissioner determined a deficiency in income taxes against the taxpayer of $1,918.60 for the year 1932 and on July 30, 1936, in accordance with the provisions of the applicable statute, sent the taxpayer by registered mail a notice of said deficiency.

Within ninety days thereafter the taxpayer filed his appeal, in the form of a petition for review of the determination of said deficiency as set forth in said notice of deficiency, with the United States Board of Tax Appeals. The case was in due course tried before the Board and submitted for its decision, and on August 16, 1938, the Board promulgated its findings of fact and opinion therein, and on October 10, 1938, entered its judgment and final order

of redetermination wherein and whereby it ordered and decided that there was a deficiency of $1,831.10 in the taxpayer's income tax for 1932.

III

The determination by the Commissioner of the deficiency in taxpayer's income tax for 1932 arose out of and was based upon the following briefly outlined state of facts:

In 1931 petitioner, acting for himself and J. Steve Anderson and R. Olsen jointly, contracted to purchase and purchased from Oklahoma City Company, a corporation, certain property and property rights consisting of fee title to real estate, oil and gas royalty interests in real estate and the right to receive in-oil payments out of oil and gas production from real estate, according to the terms and conditions of a written contract to which reference may be made for a fuller statement. The title to the property and property rights thus acquired was taken and held by petitioner in the proportion of 45% to himself, 45% to Anderson, and 10% to Olsen, according to a written agreement between them. The contract for the purchase of the property and property rights provided for payment of a cash consideration of $50,000 and that the seller should receive one-half of all proceeds derived from oil and gas produced from the property or from the sale of fee title to any of the real estate until it had received the additional sum of $110,000 with 6% interest thereon from the date of the contract, and [fol. 54] that the seller should have a first lien and claim against one-half of all of the oil and gas production and the fee interest in the real estate from the proceeds of which said sum was payable until it was fully paid.

During 1932 the gross sum of $81,547.15 was received by petitioner from oil and gas production and in-oil payments from the property, and one-half thereof was paid to Oklahoma City Company in accordance with the terms of the contract. No part of the sum paid over to Oklahoma City Company was included in income on petitioner's tax return. The Commissioner determined that all of the $81,547.15 was gross income to Anderson, Olsen and petitioner in the proportions stated above, and included the petitioner's proportion thereof in his income and based the determination of a deficiency in tax thereon.

At the time petitioner was negotiating with Oklahoma City Company for the purchase of the property and prop-

erty rights in question, he was also negotiating with Oil Brokerage and Investment Company, a corporation, the name of which was later changed to Winkler-Koch Company, for the purchase by it of an interest therein. These negotiations resulted in the sale and assignment to Oil Brokerage Company of a half interest in all of the property and property rights acquired by petitioner from Oklahoma City Company, subject to the terms and conditions of his contract with that company, for the price and consideration of $50,000 in cash, but with the provision that Oil Brokerage Company should have and receive all revenues of every kind realized from the property which were payable to him under his agreement with Oklahoma City Company until it had received $50,000, and with the further provision that in event it failed to receive full $50,000 from such revenues, then he would pay half of its loss.

In 1931 Oil Brokerage Company received part of the $50,000 from the specified revenues and in 1932 received the final payment thereon of $23,695.91. The petitioner did not include in income on his tax return any part of the above amount paid to Oil Brokerage Company. The Commissioner in determining the deficiency involved included 45% thereof in petitioner's income.

After Oil Brokerage Company had received the final payment of $23,695.91 out of the specified revenues purchased [fol. 55] under its contract, there remained the sum of $16,364.20 out of the half of the proceeds derived from the properties in 1932 which went to petitioner under his contract with Oklahoma City Company. One-half of this, or $8,182.10, was paid to Oil Brokerage Company, but did include 45% of the like sum divided among Anderson, Olsen and himself. The Commissioner in determining the deficiency involved included 45% of said sum of $8,182.10 paid to Oil Brokerage Company in petitioner's income.

The action of the Commissioner in including in petitioner's income 45% of the payments of money derived from the properties involved which were retained by and payable to Oklahoma City Company and those which were acquired by and payable to Oil Brokerage Company was assigned as error by the petitioner before the Board of Tax Appeals.

In the findings of fact, opinion and final decision of the Board above referred to, the Commissioner's contention is upheld and all of the income from the property and property rights involved during 1932 is deemed and held to be

income to Anderson, Olsen and petitioner in the percentages above mentioned, and the deficiency in tax adjudged against petitioner for said year is based thereon.

IV

The petitioner says that in the record and proceedings before the Board of Tax Appeals and in its opinion, decision and final order of redetermination as rendered and entered, manifest error occurred and intervened to the prejudice of the petitioner, and he assigns the following errors and each of them and avers that these occurred in the said record, proceedings, findings of fact, opinion, decision and final order of redetermination, and that upon these he relies to reverse to said decision and final order of redetermination so rendered and entered by the Board of Tax Appeals, to-wit:

(1) The Board of Tax Appeals erred in that its findings of fact in respect of the source from which derived, the ownership, apportionment and payment over of the gross proceeds derived and realized from said property and property rights in 1932 is not supported by any evidence in the record and is contrary to the evidence.

(2) The Board of Tax Appeals erred in holding that the [fol. 56] half of the gross proceeds derived and realized in 1932 from oil and gas production and from in-oil payments from the property and property rights involved which was payable and was paid to Oklahoma City Company was income to Anderson, Olsen, and petitioner.

(3) The Board of Tax Appeals erred in refusing to hold that no part of the gross proceeds realized and derived in 1932 from the property and property rights involved which were payable and were paid to Oklahoma City Company was income to Anderson or Olsen or petitioner or any of them.

(4) The Board of Tax Appeals erred in holding that that part of the half of the gross proceeds derived and realized from said property and property rights in 1932 and which were paid to Oil Brokerage Company in final payment of the $50,000 due it by contract, was income to Anderson, Olsen and petitioner.

(5) The Board of Tax Appeals erred in refusing to hold that no part of the gross proceeds derived and realized from said property and property rights in 1932 which were payable and were paid to Oil Brokerage Company in final

payment of the $50,000 due it by contract was income to Anderson or Olsen or petitioner or any of them.

(6) The Board of Tax Appeals erred in holding that all of the half of the gross proceeds derived and realized from said property and property rights in 1932 remaining after Oil Brokerage Company had received payment in full of the $50,000 payable to it by contract out of such one-half thereof, was income to Anderson, Olsen and petitioner.

(7) The Board of Tax Appeals erred in refusing to hold that only one-half of that part of the half of the gross proceeds derived and realized from said property and property rights in 1932 remaining after Oil Brokerage Company had been paid in full the $50,000 payable to it therefrom by contract was income to Anderson or Olsen or petitioner or any of them.

(8) The Board of Tax Appeals erred in determining that there was a deficiency in petitioner's income tax for the year 1932 in the amount of $1,831.10 and rendering a judgment therefor.

(9) The Board of Tax Appeals erred in not determining [fol. 57] and adjudging that there was no deficiency in petitioner's income tax for 1932.

Wherefore, the petitioner asks that a transcript of the proceedings before the Board of Tax Appeals be prepared in accordance with law and the rules of the United States Circuit Court of Appeals for the Tenth Circuit and transmitted to the clerk of said court for filing; that appropriate action be taken by said court to the end that the errors complained of herein may be reviewed and corrected; that the said decision of the said Board be reversed and set aside and the cause remanded to the Board with directions to conform its final order, decision and judgment to the law applicable as declared by said court; and that the petitioner have such further or other and different relief in the premises as shall be lawful, just and proper.

Chas. H. Garnett, 608 Hales Building, Oklahoma City, Oklahoma, Attorney for Petitioner.

Duly sworn to by Chas. H. Garnett. Jurat omitted in printing.

[Notice of filing petition for review appears in identical form at page 38 of the printed record and is therefore omitted here.]

[Praecipe for record appears in identical form at page 38 of the printed record and is therefore omitted here.]

[fol. 58] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 59] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 86970

R. OLSEN, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

[Appearances and docket entries appear in identical form at page 1 of the printed record and are therefore omitted here.]

PETITION—Filed Oct. 19, 1936

The above named petitioner hereby petitions for redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency dated July 30, 1936, and as a basis of this proceeding alleges as follows:

I

The petitioner is a citizen and resident of the State of Oklahoma and his post office address is Ramsey Tower, Oklahoma City, Oklahoma.

II

The Notice of Deficiency, a copy of which is attached hereto and marked Exhibit A, was mailed to petitioner on July 30, 1936.

III

The taxes in controversy are income taxes for the calendar year 1932 and the amount involved and in dispute is $337.77.

IV

The determination of the deficiency set forth in said Notice of Deficiency is based upon the following errors:

(1) The inclusion in income of alleged profits and income in the sum of $2,505.85 arising out of petitioner's interest in certain property acquired from the Oklahoma City Com- [fol. 60] pany in 1931 and owned and operated throughout 1932 by Winkler-Koch Royalty Company, a corporation, L. H. Prichard, J. Steve Anderson and petitioner, who are said by the Commissioner to constitute a joint venture, for that petitioner's interest in said joint venture was acquired as compensation for personal services rendered by him and his agent and trustee, L. H. Prichard, in 1931, and its then fair market value was its cost, and no income above such cost was realized by petitioner therefrom in 1932.

(2) The inclusion in income of an additional $2,505.85 as petitioner's alleged distributive share in the income and profits of the joint venture referred to in the preceding paragraph, for that, if there were any net profits in said joint venture in which petitioner was entitled to share, the amount thereof was less than that included in income on his return.

(3) The inclusion in income of $778.48 alleged to have been petitioner's distributive share of the net profits of the Prichard-Olsen joint venture, for that said joint venture had no profits in said year.

(4) The disallowance of the deduction from income of commissions in the sum of $1,121.25 paid on purchases of securities and commissions in the sum of $1,057.25 paid on the sales of securities, for that the petitioner was engaged in the business of buying and selling securities and the payment of said commissions was part of the ordinary expense of carrying on his said business and deductible as such.

(5) The disallowance of the deduction from income of losses sustained on the sale of assets and by theft during the taxable year in the sum of $2,560.46.

V

The facts upon which the petitioner relies as the basis of this proceeding and in support of the foregoing assignments of error are as follows:

(1) For some time prior to March 19, 1931, L. H. Prichard, a business associate of J. Steve Anderson and Petitioner, and acting as agent and trustee for himself and them, carried on negotiations with the Oklahoma City Company, a corporation, of Oklahoma City, Oklahoma, for the pur- [fol. 61] chase of a number of items of property consisting of real estate in fee, royalty interests or mineral rights in real estate, interests in the working interest or leasehold interest in oil and gas leases, and rights to receive various sums of money to be paid out of oil and gas to be produced from oil and gas properties, being what is commonly known as in-oil payments. All of these parcels and kinds of property were situated in Oklahoma City, in the County and State of Oklahoma, and were generally classed as oil properties, for that they either had or were believed to have oil value. J. Steve Anderson and petitioner were to assist and did assist said L. H. Prichard, who acted as agent and trustee for them as well as for himself, in carrying on said negotiations, and it was understood and agreed among them that whatever contract might be entered into and transactions consummated and properties acquired in the name of L. H. Prichard through such negotiations would belong to the three of them in the proportion of 45% to J. Steve Anderson, 45% to L. H. Prichard, and 10% to petitioner. As a result of the negotiations mentioned, the Oklahoma City Company agreed to sell, convey and assign all the property in question for the consideration of $50,000 to be paid in cash, and $110,000 to be paid with interest out of one-half of the proceeds derived from all oil and/or gas produced, saved and sold from the property, and one-half of the proceeds derived from the sale of any part of it. Thereupon L. H. Prichard opened negotiations with the Oil Brokerage and Investment Company, a corporation of Wichita, Kansas, the name of which was later changed to Winkler-Koch Royalty Company already referred to herein, for the purchase by the latter of an interest in said property offered for sale by the Oklahoma City Company. These negotiations resulted in an agreement between L. H. Prichard and said Oil Brokerage and Investment Company that it would

pay the $50,000 down payment in cash required to be paid to the Oklahoma City Company, and in consideration thereof should have the right to receive and be paid back that $50,000 out of one-half of any and all revenues of every kind and description that might be realized from the property, and thereafter should receive one-fourth of such revenues until the sum of $110,000, required to be paid to the Oklahoma City Company in accordance with its proposal out of one-half of all revenues from the property, should be fully paid [fol. 62] from that source, and thereafter should receive one-half of all revenues of every kind and character that might be realized from the property.

On his part, the said L. H. Prichard agreed to consummate the purchase of the property from the Oklahoma City Company on the terms offered and to take title to it in his name and then to assign to the Oil Brokerage and Investment Company the interest therein that it would be entitled to receive under the agreement with it, and further agreed personally to stand one-half of any loss that it might sustain in event it did not receive back the full $50,000 paid in cash out of the portion assigned to it in the agreement of the revenues from the property. Pursuant to this agreement with the Oil Brokerage and Investment Company, L. H. Prichard, under date of March 19, 1931, entered into a written contract and agreement with the Oklahoma City Company for the purchase of the property in question on the terms previously proposed. Then, under date of March 23, 1931, L. H. Prichard made written assignment to the Oil Brokerage and Investment Company of the interest in the property which it was to acquire under the previous agreement between it and said L. H. Prichard, and also made written assignment to J. Steve Anderson and petitioner of their interests therein. Thereupon the Oil Brokerage and Investment Company paid the $50,000 down payment in cash to the Oklahoma City Company, or to L. H. Prichard for payment to that company, and thereupon the Oklahoma City Company executed and delivered to L. H. Prichard valid instruments conveying to him the various rights and interests in property, and the parcels of property, specified in the contract, together with abstracts of title to the real estate involved and contracts and title papers for the leasehold interests and in-oil payments, and thereupon L. H. Prichard took possession of all of said property and property rights and held the title

thereto in trust for himself and for J. Steve Anderson, this petitioner, the Oil Brokerage and Investment Company and the Oklahoma City Company, according to his and their respective interests therein.

Thereafter L. H. Prichard collected all income from the property, sold and conveyed certain portoins of it and distributed the revenues and proceeds in accordance with the [fol. 63] rights and interests of the various parties therein as above set forth.

Upon this state of facts, the petitioner says that all and whatever interest was acquired by L. H. Prichard in said property for himself and his said associates, J. Steve Anderson and this petitioner, was received and realized for his services and theirs in negotiating, consummating and carrying out the said contracts with the Oklahoma City Company and the said contract with the Oil Brokerage and Investment Company, for that he never at any time invested any money or other thing of value of his own or of his said associates, J. Steve Anderson and this petitioner, in the property or the enterprise, or any phase of it, and never agreed, promised or in any way obligated himself to pay any money or thing of value for or on account of the interest which he acquired in said property for himself and his said associates other than that he, for himself and his said associates, agreed to stand one-half of whatever loss the Oil Brokerage and Investment Company might sustain in event it did not receive back the $50,000 cash payment made by it from the source stipulated in the agreement. But this obligation was secondary and contingent, and, because of the known large value and revenue producing character of the property involved, placed no reasonably possible liability on him and his said associates.

If, as the petitioner says, the interest in said property so acquired by L. H. Prichard for himself and J. Steve Anderson and this petitioner was compensation for personal services performed by him and them, or by him for them, then its fair market value at the time acquired was the cost thereof to them. In such event, he and his associates, including this petitioner, would be entitled to have return of their cost in said property before they could have any income or gain therefrom, and the total revenues and income derived from said property during the year 1932 were less than its fair market value, which is the cost of petitioner and associates therein when acquired in 1931. The Commissioner

has included the sum of $2,505.85 in petitioner's income as alleged profits accruing to him from said joint venture and coming from said properties. Petitioner says that it is error for the Commissioner to include any part of the revenues [fol. 64] and income from the said properties in the year 1932 in his gross income.

(2) By the contract between L. H. Prichard, in his representative capacity as trustee for himself and J. Steve Anderson and this petitioner, and the Oklahoma City Company for the purchase of the property, it is provided that the Company should receive one-half of the proceeds derived from all and every part of the property involved either by income therefrom or gain on the sale thereof until it received the sum of $110,000, with interest thereon at the rate of 6% per annum from March 19, 1931. The petitioner says that the right to receive this $110,000 represented a retained interest by the Company in the property conveyed and assigned and was in substance and in fact a reserved or excepted interest in the conveyance and assignment thereof to the extent of $110,000. The interest in the property which that $110,000 represented never passed or belonged to or became the property of L. H. Prichard and those whom he represented. None of said sum as derived from said property was his or their income, but at all times was the property and money and income of and belonged to the Oklahoma City Company, and L. H. Prichard, in collecting and receiving it into his hands and paying it over to the Oklahoma City Company, acted as the mere agency or channel through which the Company's retained interest in the property was converted into money and transmitted to it.

The same is true in respect of the $50,000 payment to the Oil Brokerage and Investment Company. The right to receive this sum out of one-half of the first money realized from the property in whatever manner was part of the interest which it purchased from the Oklahoma City Company for $50,000 paid in cash. No part of that $50,000 as realized from the property ever passed or belonged to L. H. Prichard individually or as trustee and agent for J. Steve Anderson and this petitioner or in any way became the money of either of them. In collecting and receiving it into his hands and paying it over to the Oil Brokerage and Investment Company he was merely the agency of that company through which it realized on its right to receive said sum.

During the year 1931 the total revenue and proceeds derived from the property involved was $55,833.17, of which one-half belonged and was paid to and received by the Okla- [fol. 65] homa City Company, and the other one-half, less $1,612.49 of expense, was paid to and received by the Oil Brokerage and Investment Company or its successor, the Winkler-Koch Royalty Company. During the year 1932 the total revenue and proceeds derived from the property was $81,547.15, of which one-half belonged and was paid to and received by the Oklahoma City Company. Out of the remaining one-half, being $40,773.57, there was deducted $713.47 of expense and from the remaining $40,060.11 the Winkler-Koch Royalty Company, successor to the Oil Brokerage and Investment Company, received $23,695.91 to complete the repayment to it of the $50,000 with which it had purchased its interest in the property. This left a balance out of said remaining half of $16,364.20, of which fifty per cent went to Winkler-Koch Royalty Company and five per cent was gross income to the petitioner, in event his contention made under assignments of error IV(1) and V(1), supra, is denied and it is determined and held that he had no cost in said property. This amount of gross income would be subject to proper adjustments for depletion, and also, by reason of capital expenditures in development and operation of the property, for depreciation. Upon making these adjustments, the amount of petitioner's net taxable income from said joint venture is determined to be $436.65. On his return he included $703.33 of income from this source. The Commissioner has included the additional sum of $2,505.85 as income from this source in determining the deficiency here involved. The petitioner says that since he has already overstated such income on his return, the action of the Commissioner in including said additional sum of $2,505.85 as derived from the said joint venture is erroneous.

(3) In 1931 an agreement was made by L. H. Prichard, for himself and as agent and trustee for J. Steve Anderson and petitioner, with a group of persons, fifteen in number and herein referred to as investors; whereby the investors were to furnish L. H. Prichard with money with which to buy oil properties and in-oil payments and were to receive out of the first net income from oil properties or in-oil payments purchased all money furnished by them. Then when they

had thus received repayment of all money advanced, the properties and in-oil payments were to belong one-half to the investors, apportioned among them according to the [fol. 66] amount of money contributed by each, and one-half to L. H. Prichard, J. Steve Anderson and petitioner, in the proportions of 45% to L. H. Prichard, 45% to J. Steve Anderson and 10% to petitioner, and L. H. Prichard was to hold the legal title to said properties and in-oil payments in trust for all the other parties according to their respective interests therein.

The investors advanced to L. H. Prichard $17,500 for the enterprise, which is termed by the Commissioner the Prichard-Olsen joint venture. During the year 1932 net income from investments of the venture amounted to $15,565.58, according to the Revenue Agent's report on which the Commissioner's Notice of Deficieney is based in part. This was all payable and was paid to the investors according to the original agreement and was insufficient to repay the sum advanced by them. The petitioner realized no gain whatever from this source in the taxable year. The Commissioner has included in petitioner's income the sum of $778.48, computed as 5% of $15,565.58, as gain from this venture. The petitioner says that this is erroneous.

(4) During the taxable year petitioner was actively engaged in the purchase and sale of securities on stock exchanges through brokers employed for that purpose. The number of his transactions of this character amounted to approximately two hundred, and they constituted an important part of the business carried on by him during the year. In these transactions he paid his brokers as commissions on purchases of securities the sum of $1,121.25, and on sales of securities the sum of $1,057.25. These commissions, in the total sum of $2,178.50, the Commissioner has disallowed as a deduction on the ground that they are part of the cost of the securities purchased and can be taken into account only in determining the question of gain or loss on the sale of them, and that, since the petitioner in fact sustained a loss of $11,677.13 on his purchases and sales of securities, exclusive of said commissions paid, and since he is not a dealer within the provisions of Sec. 23(r) (3) of the Revenue Act of 1932, he is not permitted to take a deduction of said losses by reason of the provisions of Sec. 23(r) (1) of said Act. The petitioner says that this is erroneous, for that the commissions paid as set forth above are ordinary

business expense and deductible as such, and particularly that the commissions paid on the sales of securities can not possibly be classified as cost of property sold.

[fol. 67] (5) During the year the petitioner sold various mineral or royalty interests in real estate upon which he sustained a loss, and also suffered a loss by theft, all of which, amounting to the total sum of $2,560.46, the Commissioner has disallowed as a deduction from income. The properties, with cost, sale price and amount of loss, are as follows:

Property	Cost	Sale Price	Loss
Royalty No. 145	$600.00	$5.00	$595.00
Royalty No. 48	372.13	3.33	368.80
Royalty No. 138	800.00	5.00	795.00
Loss on buildings and fences stolen			901.66
Total Loss			$2,560.46

Petitioner says he is entitled to the allowance of the above sum as a deduction from income and that the Commissioner has erroneously denied his right thereto.

VI

The petitioner says that the determination of his income and deductions for the year 1932, as set forth in said Notice of Deficiency, Exhibit A hereto, is correct except in respect of the matters hereinabove alleged to constitute error, and that if and when the errors alleged in this petition are sustained in whole or in part by the decision of the Board, then his tax liability may be ascertained and determined by making whatever corrections or changes, if any, in his net income for said year, as shown by said Notice of Deficiency, may be required by the Board's decision. This may be done under Rule 50.

Wherefore, the petitioner prays that the Board may hear this proceeding and determine that the errors assigned herein are well taken and should be sustained and granted, and that the petitioner's net income and tax liability may be re-determined after a correction of the errors herein assigned in accordance with the decision of the Board in this proceeding.

Chas. H. Garnett, Attorney for Petitioner, 608 Hales Building, Oklahoma City, Oklahoma.

Duly sworn to by R. Olsen. Jurat omitted in printing.

[fol. 68] EXHIBIT "A" TO PETITION

Jul. 30, 1936.

IT:AR:E-1.
JF-90D.

Mr. R. Olsen, Ramsey Tower, Oklahoma City, Oklahoma.

SIR:

You are advised that the determination of your income tax liability for the taxable year 1932 discloses a deficiency of $337.77 as shown in the statement attached.

In accordance with section 272(a) of the Revenue Act of 1932, as amended by section 501 of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully, Guy T. Helvering, Commissioner, by (Signed) W. T. Wherwood, Acting Deputy Commissioner.

[fol. 69] Enclosures: Statement, Form 870.
JF/LEK-1.

Statement

IT:AR:E-1.

In re: Mr. R. Olsen, Ramsey Tower,
Oklahoma City, Oklahoma

Income Tax Liability.

Year	Income Tax Liability	Income Tax Assessed	Deficiency
1932	$337.77	None	$337.77

The report covering the examination of your accounts and records as made by the internal revenue agent in charge, Oklahoma City, Oklahoma, for the year 1932, has been reviewed and approved by this office.

The following changes have been made in your tax liability:

Net income reported on return		$1,132.47
Overstated by .02		$1,132.45
Add:		
1. Increase in royalty income	$3,284.25	
2. Decrease in loss	2,607.29	
3. Deductions disallowed	2,151.75	8,043.29
Total		$9,175.74
Deduct:		
4. Decrease in rent income		44.94
Net income adjusted		$9,130.80

Computation of Tax

Net income adjusted	$9,130.80
Less:	
Personal exemption and credit for dependents	3,300.00
Net income subject to normal tax	$5,830.80
[fol. 70] Normal tax at 4% on $4,000.00	$160.00
Normal tax at 8% on $1,830.80	146.46
Surtax on $9,130.80	31.31
Total tax	$337.77
Tax previously assessed	None
Deficiency	$337.77

Explanation of Changes

1. In-oil payments received in connection with the Patterson Deal and oil properties of the Prichard-Olsen joint venture have been included as taxable income in accordance with the decision rendered in the Comar Oil Company case, 24 United States Board of Tax Appeals, 688 affirmed in the Circuit Court of Appeals, 64 Fed. (2d) 963.

2. Loss on sale of assets has been decreased by $2,607.29 for the following reasons:

Depletion previously sustained, of $39.60, in connection with royalty No. 281, has been considered in arriving at the profit from sale.

Royalty No. 145 sold for $5.00 was condemned prior to 1932 leaving a zero cost basis.

Fee No. 295 was lost through foreclosure and not through sale.

Royalty No. 48 was condemned prior to 1932, leaving a zero cost basis.

Loss from sale of royalty No. 138 was not substantiated as being a bona fide sale.

Loss from stolen buildings and fences was not allowed for this loss was not substantiated.

An adjustment of these items discloses a loss of $764.50 instead of $3,371.79, as shown on the return.

3. Depreciation on a business automobile was increased by $10.00 to provide for the remaining depreciation allowable.

Commissions paid on purchase and sale of securities which reflected a net loss have been disallowed as they are considered an integral part of the transactions resulting in a loss not deductible under section 23(r) of the Revenue Act of 1932.

[fol. 71] 4. Rent income has been decreased by the portion of the royalty from the Patterson Deal reported in these adjustments under royalties.

Depreciation deduction has been allowed for $603.33 based upon the cost as shown by your books and a rate of 5 per cent, which is considered a reasonable rate for these properties.

Repairs have been allowed for $339.05, instead of $254.05, as shown on the return.

The net adjustment results in loss of $44.94 from rents.

A letter of final determination is being issued to comply with the request of your attorney, Mr. T. H. Marshall.

A copy of this letter has been mailed to your representative, Mr. T. H. Marshall, 1000 Ramsey Tower, Oklahoma City, Oklahoma, in accordance with the authority contained in the power of attorney executed by you and on file with the Bureau.

BEFORE UNITED STATES BOARD OF TAX APPEALS

ANSWER—Filed November 17, 1936

Comes Now the respondent by his attorney, Herman Oliphant, General Counsel for the Department of the Treasury, and for answer to the petition of the above-named taxpayer, admits and denies as follows:

I. Admits the allegations contained in Paragraph I of the petition.

II. Admits the allegations contained in Paragraph II of the petition.

III. Admits the allegations contained in Paragraph III of the petition.

IV. (1) to (5), incl. Denies that the Commissioner erred as alleged in sub-paragraphs (1) to (5), inclusive, of Paragraph IV of the petition.

V. (1) to (5), incl. Denies the allegations contained in subparagraphs (1) to (5), inclusive, of Paragraph V of the petition.

Denies each and every material allegation of fact contained in the petition not hereinbefore specifically admitted, qualified or denied.

[fol. 72] Wherefore, it is prayed that the taxpayer's appeal be denied.

(Signed) Herman Oliphant, General Counsel for the Department of the Treasury.

Of Counsel: William E. Davis, Stanley B. Anderson, Special Attorneys, Bureau of Internal Revenue.

Received November 17, 1936, United States Board of Tax Appeals.

[Memorandum findings of fact and opinion and petitioner's exhibits 1, 2 and 3 appear in identical form at page 14 of the printed record and are therefore omitted here.]

[Petitioner's motion for vacation of findings of fact and opinion and for reconsideration and redecision appears in

identical form at page 28 of the printed record and is therefore omitted here.]

BEFORE UNITED STATES BOARD OF TAX APPEALS

DECISION

Pursuant to the Board's Memorandum Findings of Fact and Opinion entered August 16, 1938, the respondent on September 7, 1938, filed a proposed computation which was not contested by the petitioner at the hearing on September 28, 1938. Therefore, it is

Ordered and Decided, that there is a deficiency for the year 1932 in the amount of $329.80.

(Signed) J. E. Murdock, Member, United States Board of Tax Appeals.

Entered October 10, 1938.

IN UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

PETITION FOR REVIEW OF FINDINGS OF FACT, OPINION, DECISION AND JUDGMENT OF UNITED STATES BOARD OF TAX APPEALS IN THE CASE OF R. OLSEN VS. COMMISSIONER OF INTERNAL REVENUE, B. T. A. DOCKET NO. 86,970—Filed December 30, 1938

To the Honorable Judges of the United States Circuit Court of Appeals for the Tenth Circuit:

[fol. 73] Now comes R. Olsen by Chas. H. Garnett, his attorney, and respectfully shows unto the court that:

I

The petitioner, herein sometimes referred to as the taxpayer, is a citizen and resident of Oklahoma County in the State of Oklahoma and his address is Ramsey Tower, Oklahoma City, Oklahoma.

The respondent is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, Guy T. Helvering, herein sometimes referred to as the Commissioner.

The taxpayer filed his income tax return for the calendar year 1932 with the Collector of Internal Revenue for the District of Oklahoma, whose office is located within the judicial circuit of the United States Circuit Court of Appeals for the Tenth Circuit wherein the taxpayer also resides.

II

The Commissioner determined a deficiency in income taxes against the taxpayer of $337.77 for the year 1932 and on July 30, 1936, in accordance with the provisions of the applicable statute, sent the taxpayer by registered mail a notice of said deficiency.

Within ninety days thereafter the taxpayer filed his appeal, in the form of a petition for review of the determination of said deficiency as set forth in said notice of deficiency, with the United States Board of Tax Appeals. The case was in due course tried before the Board and submitted for its decision, and on August 16, 1932, the Board promulgated its findings of fact and opinion therein, and on October 10, 1938, entered its judgment and final order of redetermination wherein and whereby it ordered and decided that there was a deficiency of $329.80 in the taxpayer's income tax for 1932.

III

The determination by the Commissioner of the deficiency in taxpayer's income tax for 1932 arose out of and was based upon the following briefly outlined state of facts:

In 1931 L. H. Prichard, acting for himself and J. Steve Anderson and the petitioner jointly, contracted to purchase and purchased from Oklahoma City Company, a corpora- [fol. 74] tion, certain property and property rights consisting of fee title to real estate, oil and gas royalty interests in real estate and the right to receive in oil payments out of oil and gas production from real estate, according to the terms and conditions of a written contract, to which reference may be made for a fuller statement. The title to the property and property rights thus acquired was taken and held by Prichard in the proportion of 45% to himself, 45% to Anderson, and 10% to petitioner, according to a written agreement between them. The contract for the purchase of the property and property rights provided for payment of a cash consideration of $50,000 and that the seller should

receive one-half of all proceeds derived from oil and gas produced from the property or from the sale of fee title to any of the real estate until it had received the additional sum of $110,000 with 6% interest thereon from the date of the contract, and that the seller should have a first lien and claim against one-half of all of the oil and gas production and the fee interest in the real estate from the proceeds of which said sum was payable until it was fully paid.

During 1932 the gross sum of $81,547.15 was received by Prichard from oil and gas production and in-oil payments from the property, and one-half thereof was paid to Oklahoma City Company in accordance with the terms of the contract. No part of the sum paid over to Oklahoma City Company was included in income on petitioner's tax return. The Commissioner determined that all of the $81,547.15 was gross income to Prichard, Anderson and petitioner in the proportions stated above, and included the petitioner's proportion thereof in his income and based the determination of a deficiency in tax thereon.

At the time Prichard was negotiating with Oklahoma City Company for the purchase of the property and property rights in question, he was also negotiating with Oil Brokerage and Investment Company, a corporation, the name of which was later changed to Winkler-Koch Company, for the purchase by it of an interest therein. These negotiations resulted in the sale and assignment to Oil Brokerage Company of a half interest in all of the property and property rights acquired by Prichard from Oklahoma City Company, subject to the terms and conditions of his contract with that company, for the price and consideration of $50,000 in cash, but with the provision that Oil Brokerage Company should have and receive all revenues of every kind realized [fol. 75] from the property which were payable to him under his agreement with Oklahoma City Company until it had received $50,000, and with the further provision that in event it failed to receive full $50,000 from such revenues, then Prichard would pay half of its loss.

In 1931 Oil Brokerage Company received part of the $50,000 from the specified revenues and in 1932 received the final payment thereon of $23,695.91. The petitioner did not include in income on his tax return any part of the above amount paid to Oil Brokerage Company. The Commissioner in determining the deficiency involved included 10% thereof in petitioner's income.

After Oil Brokerage Company had received the final payment of $23,695.91 out of the specified revenues purchased under its contract, there remained the sum of $16,364.20 out of the half of the proceeds derived from the properties in 1932 which went to Prichard under his contract with Oklahoma City Company. One-half of this, or $8,182.10, was paid to Oil Brokerage Company, and the other half was divided among Prichard, Anderson and petitioner in the agreed percentages. The petitioner did not include in income on his tax return any part of the above sum of $8,182.10 payable and paid to Oil Brokerage Company, but did include 10% of the like sum divided among Prichard, Anderson and himself. The Commissioner in determining the deficiency involved included 10% of said sum of $8,182.10 paid to Oil Brokerage Company in petitioner's income.

The action of the Commissioner in including in petitioner's income 10% of the payments of money derived from the properties involved which were retained by and payable to Oklahoma City Company and those which were acquired by and payable to Oil Brokerage Company was assigned as error by the petitioner before the Board of Tax Appeals.

In the findings of fact, opinion and final decision of the Board above referred to, the Commissioner's contention is upheld and all of the income from the property and property rights involved during 1932 is deemed and held to be income to Prichard, Anderson and petitioner in the percentages above mentioned, and the deficiency in tax adjudged against petitioner for said year is based thereon.

[fol. 76] IV

The petitioner says that in the record and proceedings before the Board of Tax Appeals and in its opinion, decision and final order of redetermination as rendered and entered, manifest error occurred and intervened to the prejudice of the petitioner, and he assigns the following errors and each of them and avers that these occurred in the said record, proceedings, findings of fact, opinion, decision and final order of redetermination, and that upon these he relies to reverse the said decision and final order of redetermination so rendered and entered by the Board of Tax Appeals, to-wit:

(1) The Board of Tax Appeals erred in that its findings of fact in respect of the source from which derived, the

ownership, apportionment and payment over of the gross proceeds derived and realized from said property and property rights in 1932 is not supported by any evidence in the record and is contrary to the evidence.

(2) The Board of Tax Appeals erred in holding that the half of the gross proceeds derived and realized in 1932 from oil and gas production and from in-oil payments from the property and property rights involved which was payable and was paid to Oklahoma City Company was income to Prichard, Anderson and petitioner.

(3) The Board of Tax Appeals erred in refusing to hold that no part of the gross proceeds realized and derived in 1932 from the property and property rights involved which were payable and were paid to Oklahoma City Company was income to Prichard, Anderson or petitioner or any of them.

(4) The Board of Tax Appeals erred in holding that that part of the half of the gross proceeds derived and realized from said property and property rights in 1932 and which were paid to Oil Brokerage Company in final payment of the $50,000 due it by contract, was income to Prichard, Anderson and petitioner.

(5) The Board of Tax Appeals erred in refusing to hold that no part of the gross proceeds derived and realized from said property and property rights in 1932 which were payable and were paid to Oil Brokerage Company in final payment of the $50,000 due it by contract was income to Prichard or Anderson or petitioner or any of them.

[fol. 77] (6) The Board of Tax Appeals erred in holding that all of the half of the gross proceeds derived and realized from said property and property rights in 1932 remaining after Oil Brokerage Company had received payment in full of the $50,000 payable to it by contract out of such one-half thereof, was income to Prichard, Anderson and petitioner.

(7) The Board of Tax Appeals erred in refusing to hold that only one-half of that part of the half of the gross proceeds derived and realized from said property and property rights in 1932 remaining after Oil Brokerage Company had been paid in full the $50,000 payable to it therefrom by contract was income to Prichard or Anderson or petitioner or any of them.

(8) The Board of Tax Appeals erred in determining that there was a deficiency in petitioner's income tax for the year 1932 in the amount of $329.86, and rendering a judgment therefor.

(9) The Board of Tax Appeals erred in not determining and adjudging that there was no deficiency in petitioner's income tax for 1932.

Wherefore, the petitioner asks that a transcript of the proceedings before the Board of Tax Appeals be prepared in accordance with law and the rules of the United States Circuit Court of Appeals for the Tenth Circuit and transmitted to the clerk of said court for filing; that appropriate action be taken by said court to the end that the errors complained of herein may be reviewed and corrected; that the said decision of the said Board be reversed and set aside and the cause remanded to the Board with directions to conform its final order, decision and judgment to the law applicable as declared by said court; and that the petitioner have such further or other and different relief in the premises as shall be lawful, just and proper.

Chas. H. Garnett, 608 Hales Building, Oklahoma City, Oklahoma, Attorney for Petitioner.

Duly sworn to by Chas. H. Garnett. Jurat omitted in printing.

[fol. 78] (Notice of filing petition for review appears in identical form at page 38 of the printed record and is therefore omitted here.)

(Praecipe for record appears in identical form at page 38, of the printed record and is therefore omitted here.)

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 79] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

ORDER OF SUBMISSION—September 6, 1939

These causes came on to be heard and were argued by counsel, Charles H. Garnett, Esquire, appearing for peti-

tioners, Joseph M. Jones, Esquire, appearing for respondent.

On motion, petitioners were granted leave to file a memorandum of additional authorities in this cause instanter, which was accordingly done.

Thereupon these causes were submitted to the court.

IN UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

Nos. 1870, 1871 and 1872—September Term, 1939

Charles H. Garnett for petitioners.

Joseph M. Jones, Sp. Asst. to the Atty. Gen. (James W. Morris, Asst. Atty. Gen., and Sewall Key, Sp. Asst. to the Atty. Gen., were with him on the brief) for respondent.

Before Phillips, Bratton and Huxman, Circuit Judges

OPINION—November 1, 1939

PHILLIPS, Circuit Judge, delivered the opinion of the court:

On March 19, 1931, Oklahoma City Company,[1] a corporation, entered into a written contract with L. H. Prichard. It recited that the Oklahoma Company was the owner of certain oil lands and royalties, working interests, and deferred oil payments in lands situated in Oklahoma County, Oklahoma; that the Oklahoma Company desired to sell and Prichard desired to purchase such properties. It provided that for and in consideration of the sum of ten dollars the Oklahoma Company should deliver to Prichard "good and valid instruments conveying to" Prichard the properties described in the contract, together with abstracts of title [fol. 80] thereto certified to date, and certified copies of the contracts covering the working interests and oil payments; that on approval of such abstracts and contracts by Prichard's attorneys, Prichard should pay to the Oklahoma Company $50,000 in cash; that the Oklahoma Company should have and receive one-half the proceeds received by Prichard from the sale of oil and gas from such properties, and from the sale of any of the lands conveyed to him, until the Okla-

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[1] Hereinafter referred to as the Oklahoma Company.

homa Company had received $110,000 with interest at the rate of six per cent per annum from the date of the contract; that the Oklahoma Company should have a first lien against one-half of all oil and gas produced from the properties and on one-half of the lands conveyed to secure the payment of the $110,000, but that such lien should not affect the other one-half interest in the oil and gas produced and the lands conveyed; that purchasers of oil and gas, including pipe line companies, should make payments directly to Prichard; that Prichard should make payment of one-half of the revenues derived from the sale of oil, gas, and lands at the end of 90-day periods commencing May 25, 1931, by depositing same to the credit of the Oklahoma Company in the Tradesmens National Bank of Oklahoma City, Oklahoma, with full, complete, accurate, and itemized statements of such receipts; and that a release should be placed in escrow in such bank, and upon the payment of the $110,000, with interest, it should be delivered by the bank to Prichard.

Immediately upon the execution of the contract the properties and interests described therein were conveyed and transferred to Prichard.

On March 23, 1931, Prichard entered into a contract with the Oil Brokerage and Investment Company,[2] a corporation, whereby, in consideration of $50,000, Prichard assigned and conveyed to the Investment Company an undivided one-half interest in the properties and interests described in the Prichard-Oklahoma Company contract. The contract with the Investment Company provided that it should receive all the revenues from such properties and interests payable to Prichard under the Prichard-Oklahoma Company contract until the Investment Company had received the sum of $50,000, and that after such sum had been paid the Investment Company and Prichard should each own an undivided one-half interest in such properties and interests, and that [fol. 81] Prichard should execute and deliver to the Investment Company good and sufficient instruments conveying to it an undivided one-half interest in such properties and interests. It further provided that in the event the revenues from such properties were not sufficient to reimburse the Investment Company for the $50,000 advanced by it, Prichard should pay to the Investment Company one-half of the

[2] Hereinafter referred to as the Investment Company.

difference between the revenues produced and the sum of $50,000. Prichard used the $50,000 obtained from the Investment Company to make the cash payment to the Oklahoma Company.

In the transactions, Prichard acted for himself and for Anderson and Olsen. Their respective shares in the properties and interests were set forth in a declaration of trust dated March 23, 1931, as follows: Prichard, 45 per cent; Anderson, 45 per cent; and Olsen, 10 per cent.

During the years 1931 and 1932 Prichard received all the proceeds from sales of oil and gas produced from the properties. The gross proceeds in 1931 amounted to $55,833.70. Prichard paid one-half of that amount to the Oklahoma Company and one-half to the Investment Company. The gross proceeds in 1932 were $81,547.15. Prichard paid one-half thereof to the Oklahoma Company, $23,695.91 to the Investment Company, and distributed the remainder as follows: Investment Company, 50 per cent; Anderson, 22½ per cent; Prichard, 22½ per cent; and Olsen, 5 per cent.

Prichard reported as income from the sale of oil and gas produced from the properties acquired by him from the Oklahoma Company for the year 1932, $3,165.19. Anderson reported the same amount. Each deducted an allowance for depletion. The record does not disclose the amount reported by Olsen. The Commissioner increased the amount of income and proposed deficiencies as follows: Anderson, $2,724.91; Prichard, $1,918.60; and Olsen, $337.77. The Board of Tax Appeals approved the determinations of the Commissioner. These are petitions to review the decisions of the Board.

Petitioners contend that the Oklahoma Company reserved a legal or equitable interest in one-half of the lands and interests transferred to Prichard to the extent of $110,000, with interest, and that the payments made to the Oklahoma Company were not income to petitioners.

It will be observed that the Prichard-Oklahoma Company [fol. 82] contract provided for the delivery to Prichard of good and valid instruments conveying to him the lands and interests described in the contract and made no provision for any reservation or exception in such instruments of conveyance; that the $110,000 was to be paid only out of proceeds derived by Prichard, both from the sale of oil and gas and from the sale of lands, and the contract made no

provision for any partial release by the Oklahoma Company as sales of land were made by Prichard; that it made no express reservation to the Oklahoma Company of one-half of the oil and gas produced from the properties and made no provision for payment directly to it of the proceeds derived from sales of one-half of the oil, gas, and land, but on the contrary provided that such payments should be made directly to Prichard and that at 90-day intervals he should pay the amount due the Oklahoma Company by depositing same to its credit in the Tradesmens National Bank. It will be observed further that the contract provided for the payment of interest, reserved a lien upon one-half of the oil and gas and upon a one-half interest in the land to secure the payment of $110,000, with interest, and provided for the delivery of a release when such sum with interest had been fully paid. These provisions are wholly inconsistent with an intent to reserve any interest in the Oklahoma Company other than a lien on the properties or the proceeds derived therefrom. The Oklahoma Company could not retain title to property and at the same time reserve a lien thereon. The case of Thomas v. Perkins, 301 U. S. 655, is distinguishable. There, Hammonds and Branson owned oil and gas leases on undeveloped lands in Texas which provided for a royalty of one-eighth. They assigned the leases to Faith Oil Company which, in taking the assignment, acted for itself to the extent of one-fourth and for Green and Perkins, principal owners of the stock of the company, to the extent of three-eighths each. Later, it transferred its interest to Perkins. The assignment provided for the payment of ten dollars cash and "$395,000.00 * * * out of the oil produced and saved from the * * * lands, and to be one-fourth of all the oil produced and saved." It further provided that the oil payments should be made directly to Hammonds and Branson, and that the $395,000 should be payable out of oil only and should not be a personal obligation of the assignee, its successors, or assigns. The instrument did not purport to reserve a lien. The court said:

[fol. 83] "The provisions for payment to assignors in oil only, the absence of any obligation of the assignee to pay in oil or in money, and the failure of assignors to take any security by way of lien or otherwise unmistakably show that they intended to withhold from the operation of the grant

one-fourth of the oil to be produced and saved up to an amount sufficient when sold to yield $395,000."

Thus, it will be observed that in Thomas v. Perkins, supra, no lien was reserved and payments were to be made directly by the pipe line company to Hammonds and Branson, whereas in the instant case, an unqualified conveyance was made, a lien was reserved, the right of Prichard to sell and convey was implied, and the proceeds derived from sales were to be paid directly to Prichard.

We conclude that the Oklahoma Company made no reservation of title, but merely provided for the payment of $110,000, with interest, out of one-half of the funds received by Prichard from the sale of oil, gas, and lands and reserved a lien on one-half of the oil and gas produced and on one-half the land to secure such payment. It follows that the proceeds derived by Prichard from the sale of oil and gas were income to petitioners.[3]

Under the contract between the Investment Company and Prichard the Investment Company advanced $50,000 to make the cash payment to the Oklahoma Company. the Investment Company was to receive one-half of the income from the properties until it was reimbursed for the advance, and Prichard assumed a personal obligation to the Investment Company to the extent of $25,000 of the amount advanced by it. The essence of the transaction was that the Investment Company paid $25,000 of the cash payment to the Oklahoma Company and advanced an additional $25,000 to Prichard. It follows that $25,000 of the amount of the proceeds paid to the Investment Company discharged a personal obligation of Prichard, and was income to petitioners.[4]

If the transaction be regarded as a sale by Prichard to the Investment Company for $25,000 of one-half of the lands and interests, and a loan to Prichard of $25,000, then [fol. 84] Prichard received the exact amount which he paid for such one-half and realized no income therefrom.

Counsel for the government admit that $25,000 of the $50,000 paid to the Investment Company was not taxable

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[3] Comar Oil Company v. Burnet, 8 Cir., 64 F. 2d 965, 966; Helvering v. Elbe Oil Land Company, 303 U. S. 372.

[4] Reynolds v. McMurray, 10 Cir., 69 F. 2d 843.

against petitioners and assert that in fact it was so treated by the Board. On the other hand, the petitioners assert that the full $50,000 was in fact improperly taxed as income to them. We agree that $25,000 of the $50,000 was not taxable to petitioners, but whether it was so taxed we are unable to determine from this record.

Remanded with instructions to the Board to determine whether more than $25,000 of the amount paid to the Investment Company was assessed to petitioners, and in the event it was, to make redeterminations in accordance with this opinion. The decisions in all other respects are Affirmed.

IN UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

JUDGMENT—November 1, 1939

These causes came on to be heard on the transcripts of the record from the United States Board of Tax Appeals and were argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that these causes be and the same are hereby remanded with instructions to the said United States Board of Tax Appeals to determine whether more than $25,000.00 of the amount paid to the Oil Brokerage and Investment Company was assessed to petitioners, and in the event it was, to make a redetermination in accordance with the opinion of this court; and that the decisions of the said Board in all other respects be and the same are hereby affirmed.

(On December 11, 1939, the mandates of the United States Circuit Court of Appeals, in accordance with the opinion and judgment of said court, were issued to the United States Board of Tax Appeals.)

[fol. 85] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 86] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1939

No. 682

ORDER ALLOWING CERTIORARI—Filed March 4, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 87] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1939

No. 683

ORDER ALLOWING CERTIORARI—Filed March 4, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Enter Chas. H. Garnett. File Nos. 44,089, 44,090. U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 682. J. Steve Anderson, Petitioner, vs. Guy T. Helvering, Commissioner of Internal Revenue. Term No. 693. L. H. Prichard, Petitioner, vs. Guy T. Helvering, Commissioner of Internal Revenue. Petition for writs of certiorari and exhibit thereto. Filed January 30, 1940. Term Nos. 682, O. T., 1939, 683, O. T., 1939.

In the Supreme Court of the United States

OCTOBER TERM, 1939

NO. 682

J. STEVE ANDERSON,
Petitioner,
VERSUS
GUY T. HELVERING,
Respondent.

NO. 683

L. H. PRICHARD,
Petitioner,
VERSUS
GUY T. HELVERING,
Respondent.

PETITION FOR WRITS OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

CHAS. H. GARNETT,
608 Hales Building,
Oklahoma City, Oklahoma,
Attorney for Petitioners.

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First Proposition: Under the contract of sale between the Oklahoma Company and Prichard that company retained an economic or equitable interest in the property sold and transferred to the extent in value of $110,000 and interest to accrue thereon, notwithstanding the complete legal title to such property was assigned and conveyed to and became vested in Prichard, and notwithstanding that the contract recited that the company re-

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tained a lien on one-half of all oil and gas production and fee interest out of the proceeds from which said sum was to be made and paid without personal obligation of Prichard other than to operate and/or sell and account, and therefore, the one-half of such gross proceeds realized from oil produced from the property and payable and paid to the company under the contract was income to it direct from the property and was never income to Prichard 27

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Second Proposition: Under the terms of the contract between the Oklahoma Company and Prichard he took the legal title to the properties involved by transfer and conveyance from the company as its trustee or agent or attorney in fact and repository of title for the purpose of operating and/or selling such properties and paying over to it one-half of the gross proceeds so realized therefrom up to $110,000 and hence all sums so paid to it were income direct to it from the properties and were never income to Prichard 44

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In the Supreme Court of the United States

OCTOBER TERM, 1939

NO. . . . . . .

J. STEVE ANDERSON,
Petitioner,
VERSUS
GUY T. HELVERING,
Respondent.

NO. . . . . . .

L. H. PRICHARD,
Petitioner,
VERSUS
GUY T. HELVERING,
Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES

Your petitioners respectfully show:

I.

SUMMARY STATEMENT OF MATTER INVOLVED

These cases involve income taxes for the year 1932. They present precisely the same questions of law upon the same state of facts. They arose in the United States Board of Tax Appeals and because of their substantial identity on the facts and law, they were consolidated with

each other and with a similar case brought by R. Olsen and were decided by the Board in one memorandum opinion which is not reported. Each of the petitioners before the Board filed a petition for review with the United States Circuit Court of Appeals for the Tenth Circuit. There the three cases were consolidated by agreement of the parties and order of the court, because on the only questions there presented for review they were identical. Olsen does not bring his case here because of the very small amount of tax involved in it, and this petition is presented on behalf of Anderson and Prichard only. Their cases are separately docketed but are regarded as consolidated for the purpose of this petition and the required copies of the consolidated printed record in the court below with the additional printing necessary are filed in this Court.

The issues and facts as disclosed by the pleadings and the findings of fact by the Board of Tax Appeals may be summarized as follows:

For some time prior to March 19, 1931, Prichard, a business associate of Anderson and Olsen, and acting as agent and trustee for himself and them, carried on negotiations with the Oklahoma City Company, a corporation, of Oklahoma City, Oklahoma, hereinafter referred to as the Oklahoma Company, and of which one L. E. Patterson was owner, for the purchase of a number of items of property consisting of real estate in fee, royalty interests or mineral rights in real estate, interests in the working interest or leasehold interest in oil and gas leases, and rights to receive various sums of money to be paid out

of oil and gas to be produced from oil and gas properties, being commonly known as in-oil payments. All of these parcels and kinds of property were situated in Oklahoma City, in the County and State of Oklahoma, and were generally classed as oil properties, for that they either had or were believed to have oil value. Olsen and Anderson were to and did assist Prichard in carrying on the negotiations, and it was agreed among them by an express contract that whatever properties were acquired in his name through such negotiations would belong to the three of them in the proportions of 10% to Olsen, 45% to Prichard, and 45% to Anderson (R. 26-27). As a result of the negotiations the Oklahoma Company agreed to sell, convey and assign to Prichard all the property in question for the consideration of $50,000 to be paid in cash, and $110,000 with interest to be paid out of one-half of the proceeds derived from all oil and/or gas produced, saved and sold from the property, or from the sale of any part of the property itself (R. 17-24).

Thereupon Prichard opened negotiations with the Oil Brokerage and Investment Company, a corporation of Wichita, Kansas, the name of which was later changed to Winkler-Koch Royalty Company and is sometimes referred to in the record in these cases by that name, but which will be hereinafter referred to as the Investment Company, for the purchase by that company of an interest in the properties offered by the Oklahoma Company. These negotiations resulted in an agreement between Prichard and the Investment Company that it would pay

the $50,000 down payment in cash required to be paid to the Oklahoma Company, and in consideration thereof, would receive an assignment and conveyance of a half-interest in the properties and as owners would receive half of any and all revenues of whatever kind realized from the properties until it had so received the sum of $50,000 and thereafter would receive one-fourth of such revenues until the sum of $110,000 and interest, required to be paid to the Oklahoma Company in accordance with its proposal out of one-half of the gross receipts from the properties, should be fully paid from that source, and thereafter as owner again receive one-half of all such revenues (R. 24-25).

On his part Prichard agreed to consummate the purchase of the properties from the Oklahoma Company on terms offered and to take title thereto in his name and then to assign and convey to the Investment Company the interest therein that it would be entitled to receive under the agreement with it, and further agreed personally to stand one-half of any loss that it might sustain in event it did not receive back the full $50,000 paid in cash out of the revenues from the property payable to it.

Pursuant to this agreement with the Investment Company, Prichard, under date of March 19, 1931, entered into a written contract and agreement with the Oklahoma Company for the purchase of the properties on the terms previously proposed. Then, under date of March 23, 1931, he made written assignment and conveyance to the Investment Company of the interest in these which it was

to acquire under his previous agreement with it (R. 24-25), and also made written assignment to Olsen and Anderson of their interests therein (R. 26-27).

The $50,000 down payment in cash was made to the Oklahoma Company and it executed and delivered to Prichard valid instruments conveying to him the various rights and interests in property and the parcels of property, specified in the contract, together with abstracts of title to the real estate involved and contracts and title papers for the leasehold interests and in-oil payments, all of which were absolute conveyances of title without any exception or reservation or the retention of any interest or lien therein, and thereupon Prichard took possession of all thereof and held the title thereto in trust for himself and Olsen, Anderson, the Investment Company and the Oklahoma Company, according to his and their respective interests therein.

The provision for the deferred payment of $110,000 and interest is the nub of the controversy in these cases. It is found in the third paragraph of the contract between Prichard and the Oklahoma Company and the material part of it is as follows:

> "As a further consideration the party of the first part is to have and receive one-half of the proceeds received by L. H. Prichard which may be derived from all oil and/or gas produced, saved, and sold from said above described properties, and shall have and receive one-half of the proceeds derived from the sale of fee title to any or all of the lots conveyed herein, until said party of the first part has received the sum of $110,000.00 in addition to the $50,000.00 hereinabove

mentioned. Said $110,000.00 to draw interest at the rate of 6% (six per cent) per annum from the date of the signing of this agreement, said interest to be paid from the amounts accumulated from the proceeds through sales or production as above mentioned, at which time it is understood and agreed that the party of the first part shall have no further claim to the properties above described, and it is also agreed that the party of the first part shall have a first lien and claim against that one-half of all oil and gas production and fee interest as above described from which the $110,000.00 is payable as provided for herein, it being understood and agreed that said lien and claim shall not in any way affect the one-half interest in all oil and gas production and fee interest or the revenue therefrom which party of the second part is to have and receive under this agreement * * *. It being understood and agreed between the parties hereto that any sum or sums accumulating under this agreement is payable direct to the party of the second part or assigns, including such amounts that may become due and payable from pipe line companies purchasing oil and/or gas from said properties, and it is agreed that one-half (½) of such revenues due the party of the first part shall be payable at the end of each ninety days after May 25, 1931, such sums to be placed to the credit of the party of the first part, * * * as provided for herein, in the Tradesmens National Bank of Oklahoma City, Oklahoma, at which time a full, complete, accurate and itemized statement of any oil payments or other revenues shall be submitted, and said Bank is hereby fully authorized and directed by the party of the first part to deliver to the party of the second part good and sufficient receipts for such sums, and it is agreed that a copy of this agreement with a release from the party of the first part * * * shall be

placed in escrow in said Bank until the sum of $110,000 plus interest as provided for, has been paid in full, at which time said Bank is authorized and directed to deliver to the party of the second part the release attached thereto" (R. 21-22).

Prichard took and held possession of the properties and property rights covered by the contract with the Oklahoma Company, and operated the same for the remainder of 1931 and thereafter. During 1931 and 1932 he received all money representing proceeds from sales and from oil and gas produced from the properties, and distributed it in accordance with the above contract In 1931 the gross proceeds were $55,833.17. He paid that in equal amounts to the Oklahoma Company and the Investment Company. In 1932 the gross proceeds were $81,547.15. He distributed one-half of that to the Oklahoma Company and $23,695.91 of the other one-half to the Investment Company which paid in full the $50,000 due it. Then he distributed one-half of the remainder to the Investment Company and the other half of the remainder to himself, Anderson and Olsen, in the proportions of 45, 45 and 10 (R. 15). Both Prichard and Anderson kept books and made their returns upon an accrual basis (R. 14). Prichard reported income for 1932 from the properties in question of $3,165.19 and Anderson reported the same amount. On their reported oil income from the properties they took appropriate depletion deduction. No part of the sum paid the Oklahoma Company was included in the income of either of them (R. 15).

The Commissioner in his notice of deficiency to Anderson makes the following adjustment to the income which the taxpayer reported on his return:

"Add: 1. Income from joint venture $11,612.88" (R. 11).

And in explanation of this adjustment it is said:

"1. In-oil payments received in connection with the Patterson Deal and oil properties of the Prichard-Olsen Joint Venture not reported have been included as taxable income in accordance with the decision rendered in the Comar Oil Company case, 24 United States Board of Tax Appeals, 688, affirmed in the Circuit Court of Appeals, 64 Fed. (2d) 965" (R. 12).

The "Patterson Deal" referred to is the Oklahoma Company Deal. It is so referred to because Patterson owned that company (Board's Findings of Fact, R. 15).

In the notice of deficiency in the Prichard case appears the following adjustment to income reported on the taxpayer's return:

"Add: 1. Increase in royalty income $12,684.78" (R. 50).

The explanation of this addition to income is in the identical language above quoted from the Anderson case (R. 49). [In printing the record, parts of the statement in the Prichard notice of deficiency have become transposed. That part appearing on page 50 beginning with the word "Statement" and ending with "Net income subject to Normal tax $25,177.36" should appear on page 49 preceding the line "Normal tax at 4% on $4,000 $160."]

The Prichard-Olsen Joint Venture referred to in the quoted explanation from the notices of deficiency was a transaction wholly unrelated to the Oklahoma Company or Patterson deal and the tax liability of the petitioners arising out of that transaction was stipulated before the Board (Board Findings of Fact and Opinion, R. 14) and was not involved in the Board's decision and is not involved here.

It will be noted that Prichard was not personally obligated by the contract with the Oklahoma Company for the payment of any part of the $110,000. This was payable only if, as and when realized from the properties conveyed to him.

It will also be noted that the only income from the properties here in dispute is from oil production, that is, the in-oil payments specified in the Commissioner's notices of deficiency as made in connection with the Patterson (Oklahoma Company) deal. Whether proceeds from the sales of fees paid to Oklahoma Company, if any, were or were not taxable income to Prichard is not presented on this record.

Petitioners' contention in regard to all payments made on the $110,000, whether from proceeds of oil production or from the sale of fees, is stated in Anderson's petition before the Board as follows:

> "The petitioner says that the right to receive this $110,000 represented a retained interest by the Company in the property conveyed and assigned and was in substance and in fact a reserved or excepted in-

terest in the conveyance and assignment thereof to the extent of $110,000. The interest in the property which that $110,000 represented never passed or belonged to or became the property of L. H. Prichard and those whom he represented. None of said sum as derived from said property was his or their income, but at all times was the property and money and income of and belonged to the Oklahoma City Company, and L. H. Prichard, in collecting and receiving it into his hands and paying it over to the Oklahoma City Company, acted as the mere agency or channel through which the Company's retained interest in the property was converted into money and transmitted to it" (R. 7).

The same contention in effect is made with respect to the payments to be made from revenues derived from the properties to the Investment Company (R. 7).

Precisely the same contentions are made in Prichard's petition before the Board (R. 45-46).

The Board found the facts substantially as above set forth (R. 14-16). That part of its opinion touching on the present question is in full as follows:

"The petitioners requested sixty days after the hearing within which to file a brief. The hearing was held on October 19, 1937. No brief has been filed to date. It may be that the petitioners have become convinced that there is no merit to their contentions. But in any event, we have but a poor idea of what they contend. The Commissioner treated all receipts less depletion as income, and regarded the disbursements to Oklahoma City Company, and perhaps part of those to Oil Brokerage, as payments of the purchase price of $160,000. We can find no error in this action of the Commissioner. Cf. *Comar Oil Co.*, 24

B. T. A. 688, aff'd 64 Fed. (2d) 965. This case is distinguishable in several important respects from *Thomas* v. *Perkins*, 301 U. S. 655, in which the Comar case is mentioned as 'In apparent conflict.' Payment of the purchase price here was in cash paid by Prichard. Sales of fees were involved. The seller retained a lien. How much of the gross receipts was from sales of fees, how much from oil and gas produced from fees, and how much from royalties on leases is not shown. The record does not justify any change in the Commissioner's determination relating to these items" (R. 16).

It will be noted that the Board says that:

"Payment of the purchase price here was in cash paid by Prichard."

This statement is obviously incorrect and untrue, if it is understood to mean that the entire purchase price of $160,000 was a cash payment which Prichard was personally obligated to pay and did pay in cash with his own money. So construed it ignores the fact that $110,000 of said "purchase price" was not payable out of any funds that belonged to Prichard, but only out of one-half of the proceeds "which may be derived from all oil and/or gas produced, saved and sold from said above described properties," and "one-half of the proceeds derived from the sale of fee title to any or all of the lots conveyed herein" (R. 21).

The Board's statement is understandable only on the assumption that all proceeds from the property payable to Oklahoma Company as provided was first income to Prich-

ard. But this is an assumption of the very point in controversy as an argument to support the Board's conclusion on that point. Indeed, the record shows that only one-half of $55,833.17 in 1931 and only one-half of $81,547.15 in 1932 had been realized and paid over to the Oklahoma Company out of its reserved share in the proceeds from the property. By computation it appears that at the end of 1932 the Oklahoma Company had received only $68,690.16 of the total of $110,000 and interest which it had the contract right to receive. Whether the remainder of approximately $50,000 and interest ever would be realized and received by it out of its contract right to receive one-half of the gross proceeds from the property does not appear from this record. Certainly Prichard was under no obligation to pay any deficiency in the $110,000 and interest in cash or otherwise, and unless paid from the property, it never would be paid.

It will also be noted that the Board says that:

"Sales of fees were involved."

If this is understood as meaning that sales of fees were involved in the contract with the Oklahoma Company, it is a correct statement, but if it is considered as meaning that proceeds of sales of fees were included in the additions to income here in dispute, then it is an incorrect and untrue statement, and is without support in the Board's findings of fact or otherwise in the record, for, as previously pointed out, the Commissioner's notices of deficiency, which are the very basis of the Board's juris-

diction, specifically limit the additions to the income of each taxpayer, insofar as here in controversy, to the in-oil payments to the Oklahoma Company (R. 11-12, 49-50, and page 8 *supra*).

It is repeated for emphasis that this case now deals only with the in-oil payments to the Oklahoma Company out of one-half of the proceeds from the sale of oil produced from the properties involved.

It will also be noted that the Board says that:

> "The petitioners requested sixty days after the hearing within which to file a brief. The hearing was held on October 19, 1937. No brief has been filed to date. It may be that the petitioners have become convinced that there is no merit to their contentions. But in any event, we have but a poor idea of what they contend" (R. 16).

There is no rule of the Board that requires the filing of a brief and permission to file one is a privilege. It is true that petitioners' counsel, after taking time to file a brief, had not done so at the time of the Board's opinion. The Board's quoted language indicates resentment and pique because such brief was not filed. Whether this influenced its decision petitioners do not undertake to say, and the point is not material here, for it is the decision of the Appeals Court, and not the Board's opinion, that is now under consideration.

In passing it may be said that the member who wrote the Board's opinion was not the member who tried the case, and that it was fully understood at the trial by the

member presiding and by the parties that petitioners relied on the case of *Thomas* v. *Perkins*, 301 U. S. 655, and similar decisions in various circuit courts of appeals, to support their claimed exclusion from Prichard's income of the in-oil payments to the Oklahoma Company. Indeed, the Commissioner's representative at the trial conceded that those cases would control and those in-oil payments were not properly included in Prichard's income, and it was only because of other disputed questions, reliance on which petitioners did in fact thereafter abandon, that a trial was necessary. Certainly an examination of the petitions in the case (R. 7, 45) would have given the Board a very clear idea of what the taxpayers contended in regard to those in-oil payments.

After the Board's decision and because of the above quoted stricture, counsel for petitioners filed with it a motion to vacate its findings of fact and opinion and to reconsider and redecide the case. This appears in full at pages 28 to 32 of the record and need not be reproduced here. It expresses petitioner's answer to the Board's criticism of omission to file a brief and was calculated to give it a clear idea, instead of its poor idea, of what they contended in respect of the in-oil payments, which is the only part of the Board's or of the court's decision of which the petitioners here complain. The Court may read that motion in the record if it is deemed of any importance (R. 28-32).

In its decision the Appeals Court agrees that only the

in-oil payments from proceeds of oil and gas produced from the properties were in controversy and it deals only with such in-oil payments. It says:

> "During the years 1931 and 1932 Prichard received all the proceeds from sales of oil and gas produced from the properties" (R. 81).

Then it gives the total figures of such gross proceeds for each year and the manner of the distribution thereof. It does not consider any other revenues or proceeds of any sort derived from the property than those from the sales of oil and gas (R. 81).

But that Court makes a slightly erroneous statement of petitioners' contention in the case as follows:

> "Petitioners contend that the Oklahoma Company reserved a legal or equitable interest in one-half of the lands and interests transferred to Prichard to the extent of $110,000 with interest; and that the payments made to the Oklahoma Company were not income to petitioner" (R. 81).

The petitioners never did contend that the Oklahoma Company retained any "legal" interest in the properties, for the instruments of transfer of those properties were absolute and unqualified assignments and conveyances. There was no reservation of any sort of interest, much less any legal interest, specified in those assignments and conveyances. The petitioners' contention was and is that Oklahoma Company by its stipulated right in its contract for the sale and transfer of the properties to receive $110,000 out of a portion of the proceeds and revenues realized

therefrom and not otherwise, reserved and retained an economic interest or an equitable interest in such properties entirely consistent with the passing of the absolute legal title thereto to Prichard and entirely consistent with the informal retention of a lien on one-half of all oil and gas production and fee interest as well to secure the performance of the agreement by Prichard and the payment by him of its reserved share of the stipulated gross proceeds (R. 22).

It is not necessary, and would not be helpful, to reproduce the decision of the Appeals Court here. An examination of it shows that the Board's decision is affirmed on the sole ground that because the properties were transferred to Prichard by absolute assignments and conveyances, and a lien stipulated in the contract to secure the payment to the Oklahoma Company of a reserved portion of the proceeds derived from such properties, the instant case was distinguishable from *Thomas* v. *Perkins*, 301 U. S. 655, and that, in reaching this conclusion, the Appeals Court ignored all the authorities, including decisions of this Court, holding that where one had a right to receive the payment of a certain sum or percentage out of oil production from a property and not otherwise, the legal ownership of such property was wholly immaterial, because such an one had an economic interest in the oil reserve or deposit by reason of which the in-oil payments received by him were income direct from the property to him and were not income to the holder of the legal title to the property.

The precise question which the Appeals Court decided adversely to petitioners and which is presented to this Court for consideration, is whether the Oklahoma Company, by virtue of its contract right to receive one-half of the gross proceeds from oil and gas produced from the property which it transferred to Prichard until it should have received $110,000, had such an economic interest or equitable interest in that property, notwithstanding Prichard held the legal title thereto, that those in-oil payments were its income direct from the property, or were Prichard's income from the property, and represented deferred cash payments made by him with money which belonged to him.

Then there is the further question, which was urged before the Appeals Court but not considered in its decision, and is again urged here, of whether in any event by the terms of the contract under which Prichard took title to the property involved by absolute assignments and conveyances, he held such title as trustee or agent for the Oklahoma Company to the extent of its right to receive $110,000 out of revenues realized therefrom, with power to operate and/or sell the properties and collect, receive and pay over one-half of all gross proceeds realized in any manner to that company until it received $110,000.

No question is raised here on the Appeals Court's decision in respect of the transaction between Prichard and the Investment Company.

II.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRITS

1. The Circuit Court of Appeals below, in holding that the Oklahoma Company did not have an economic interest in the oil deposit or reserve in the property which it conveyed to Prichard to the extent of the sum specified by contract as payable to it out of oil production from that property and, therefore, that amounts paid to it by him out of proceeds from such oil production were his income and not its income from the property, has rendered a decision in conflict with the decisions of the Circuit Court of Appeals of the Ninth Circuit in *Commissioner* v. *Elliott Petroleum Co.* (1936), 82 F. (2d) 193, and in *Holly Development Company* v. *Commissioner* (1937), 93 F. (2d) 146, and in *Spalding* v. *United States* (1938), 97 F. (2d) 697, and in conflict with the decisions of the Fifth Circuit Court of Appeals in *Commissioner* v. *Fleming* (1936), 82 F. (2d) 324, and in *Commissioner* v. *Williams* (1936), 82 F. (2d) 328, and in *Perkins* v. *Thomas* (1936), 86 F. (2d) 954, and in *Dearing* v. *Commissioner* (1939), 102 F. (2d) 91, and in *Ortiz Oil Corporation* v. *Commissioner* (1939), 102 F. (2d) 508, on the same matter.

2. The Circuit Court of Appeals below in its holding set forth in the preceding paragraph has decided a federal question, namely, the interpretation and application of the provisions of the Revenue Act of 1932 to the facts of the case, in a way in conflict with the applicable decisions of this Court in *Palmer* v. *Bender*, 287 U. S. 551.

Helvering v. *Twin Bell Oil Syndicate*, 293 U. S. 312, and *Thomas* v. *Perkins*, 301 U. S. 655.

3. The Circuit Court of Appeals below in holding that the one-half of all gross proceeds realized by Prichard in any manner from the property conveyed to him by the Oklahoma Company reserved and made payable to it by contract until it had received the sum of $110,000, and for the payment of which Prichard was not personally or otherwise liable, was his income, and in refusing to hold that he was merely a conduit or agency or trustee for receiving such one-half of the gross proceeds so realized and paying the same over to Oklahoma Company until the payments amounted to $110,000, has rendered a decision in conflict with the decision of the Circuit Court of Appeals of the Seventh Circuit in *Shellabarger* v. *Commissioner* (1930), 38 F. (2d) 566, and with the decisions of the Circuit Court of Appeals of the Eighth Circuit in *Bettendorf* v. *Commissioner* (1931), 49 F. (2d) 173, and *Central Life Assurance Society Mutual* v. *Commissioner* (1931), 51 F. (2d) 939, and with the decision of the Court of Appeals of the District of Columbia in *112 West 59th Street Corporation* v. *Helvering* (1933), 68 F. (2d) 397, on the same matter.

4. The Circuit Court of Appeals below, in its holding set forth in the preceding paragraph, has decided an important question of general law in a way probably untenable and in conflict with the weight of authority, for that its decision is in conflict with the cases cited in the preceding paragraph and with numerous decisions of the

United States Board of Tax Appeals, among which are *Stephen J. Hallahan* (1928), 14 B. T. A. 584, and *Mark D. Eagleton* (1937), 35 B. T. A. 551, and with the applicable decision of this Court in *Helvering v. Falk*, 291 U. S. 183.

Wherefore, your petitioners pray that writs of certiorari issue under the seal of this Court directed to the United States Circuit Court of Appeals for the Tenth Circuit at Denver, Colorado, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Court had in case No. 1870 entitled *J. Steve Anderson, petitioner*, v. *Commissioner of Internal Revenue, respondent*, and in case No. 1871 entitled *L. H. Prichard, petitioner*, v. *Commissioner of Internal Revenue, respondent*, to the end that said causes and each of them may be reviewed and determined by this Court as provided by the Statutes of the United States and that the judgments of said United States Circuit Court of Appeals in each of said causes be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated at Oklahoma City, Oklahoma, this 25th day of January, 1940.

J. STEVE ANDERSON,
L. H. PRICHARD,
Petitioners,

By CHAS. H. GARNETT,
608 Hales Building,
Oklahoma City, Oklahoma,
Counsel for Petitioners.

In the Supreme Court of the United States

OCTOBER TERM, 1939

NO. . . . . . .

J. STEVE ANDERSON,
Petitioner,
VERSUS
GUY T. HELVERING,
Respondent.

NO. . . . . . :

L. H. PRICHARD,
Petitioner,
VERSUS
GUY T. HELVERING,
Respondent.

PETITION IN SUPPORT FOR WRITS OF CERTIORARI

I.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI

The opinion of the Board of Tax Appeals in these cases is a memorandum opinion and is not officially reported. It appears at pages 14 to 17 of the record.

The opinion of the Circuit Court of Appeals below is reported in 107 Fed. (2d) 459 and appears at pages 79 to 84 of the record.

II.
JURISDICTION

1. The date of the judgment to be reviewed is November 1, 1939 (R. 84). The opinion of the court was handed down on the same date (R. 79).

2. The statutory provision under which the jurisdiction of this Court is invoked and which is believed to sustain its jurisdiction, is Section 347(a) of Title 28 of the United States Code, being Section 240 of the Judicial Code, as amended.

3. The decision of the court below is in conflict with the decisions of the various Circuit Courts of Appeals and of this Court as set forth in the statement of the grounds relied on for issuance of the writs in the petition filed herein. This Court entertains jurisdiction to grant writs of certiorari in similar cases at every term, and among the great number of such similar cases in which the writ has been granted are the following, which are believed to sustain this court's jurisdiction here:

Helvering v. *Winmill*, 305 U. S. 79.

United States Trust Co. v. *Helvering*, 307 U. S. 57.

4. The petition for the writs is presented under Rule 38, paragraph 5(b), of the revised rules of this Court as amended to June 4, 1934.

III.
STATEMENT OF THE CASE

A concise statement of the case containing all that is material to the consideration of the questions presented, with appropriate page references to the printed record, has been made in the petition for the writs herein and such statement is hereby adopted and made a part of this brief.

IV.
ASSIGNMENT OF ERRORS

The petitioners make the following assignment of errors committed in the opinion and decision of the court below:

1. The Circuit Court of Appeals erred in holding that the one-half of the gross proceeds of oil and gas produced in 1932 from property sold and conveyed to L. H. Prichard in 1931 by the Oklahoma Company, which was payable and was paid to that company under the provisions of the contract for the sale of said property which gave it the right to receive one-half of such gross proceeds until it had received $110,000, but without any personal obligation on Prichard's part to pay said sum or any part of it, was includable in his gross income.

2. The Circuit Court of Appeals erred in holding that because the Oklahoma Company transferred the absolute and unqualified legal title to the properties involved to Prichard, without reserving or excepting to itself any re-

tained interest in such legal title, its contract right to receive a part of the gross proceeds of oil produced from such properties did not constitute an economic interest or any such retained interest therein as would make the amounts so received its income direct from the properties.

3. The Circuit Court of Appeals erred in holding that because the contract for the sale and conveyance of the properties involved recited that the Oklahoma Company should hold a lien on one-half of the gross proceeds from the sale of oil produced therefrom and from the sales of fee titles as well, such lien was inconsistent with and defeated any claim of that company to an equitable or economic interest in the property or the gross proceeds derived from it.

4. The Circuit Court of Appeals erred in not holding that the disputed one-half of the gross proceeds of oil and gas produced from the involved properties was income direct from those properties to the Oklahoma Company and was not income to Prichard.

5. The Circuit Court of Appeals erred in holding that the instant case was distinguishable on the facts from the case of *Thomas* v. *Perkins*, 301 U. S. 655, and was not controlled and governed by that case.

6. The Circuit Court of Appeals erred in not holding that Prichard was a mere trustee or agent or attorney in fact and repository of title for the Oklahoma Company in taking the legal title to and possession of the property transferred and operating and or selling the same and pay-

ing over one-half of the gross proceeds to that company, and hence that the amounts so paid by him were income to it realized direct from the properties through his agency and that no part of these was income to him.

7. The Circuit Court of Appeals erred in not holding that no part of the one-half of the gross proceeds realized from the properties involved, whether from oil production or from sales of fees or both, which was payable and paid to the Oklahoma Company under the contract provision therefor, was income to Prichard.

V.
ARGUMENT

Synopsis of Argument

In support of the errors assigned the petitioners assert and rely on the following propositions which will be presented and considered in order:

I.

Under the contract of sale between the Oklahoma Company and Prichard that company retained an economic or equitable interest in the property sold and transferred to the extent in value of $110,000 and interest to accrue thereon, notwithstanding the complete legal title to such property was assigned and conveyed to and became vested in Prichard, and notwithstanding that the contract recited that the company retained a lien on one-half of all oil and gas production and fee interest out of the proceeds from which said sum was to be made and paid without personal obligation

of Prichard other than to operate and/or sell and account, and, therefore, the one-half of such gross proceeds realized from oil produced from the property and payable and paid to the company under the contract was income to it direct from the property and was never income to Prichard.

II.

Under the terms of the contract between the Oklahoma Company and Prichard he took the legal title to the properties involved by transfer and conveyance from the company as its trustee or agent or attorney in fact and repository of title for the purpose of operating and/or selling such properties and paying over to it one-half of the gross proceeds so realized therefrom up to $110,000, and hence all sums so paid to it were income direct to it from the properties and were never income to Prichard.

First Proposition

Under the contract of sale between the Oklahoma Company and Prichard that company retained an economic or equitable interest in the property sold and transferred to the extent in value of $110,000 and interest to accrue thereon, notwithstanding the complete legal title to such property was assigned and conveyed to and became vested in Prichard, and notwithstanding that the contract recited that the company retained a lien on one-half of all oil and gas production and fee interest out of the proceeds from which said sum was to be made and paid without personal obligation of Prichard other than to operate and/or sell and account, and therefore, the one-half of such gross proceeds realized from oil produced from the property and payable and paid to the company under the contract was income to it direct from the property and was never income to Prichard.

The contract of sale between the Oklahoma Company and Prichard provides that the company shall

> "Have and receive one-half of the proceeds received by L. H. Prichard which may be derived from all oil and/or gas produced and sold from said above described properties and shall have and receive one-half of the proceeds derived from the sale of fee title to any or all of the lots conveyed herein until [it has] * * * received the sum of $110,000."

and interest at 6% from the date of the contract until the above sum was paid from the specified sources (R. 21).

This was followed by a provision that the Oklahoma Company would have no interest in the property when it had received the above sum from the sources stated and that it should have a "lien and claim against that one-half of all oil and gas produced and fee interest" from which the above sum was payable.

The contract was followed by the transfer by assignments and conveyances of the full and complete legal title to all the property and property rights described in it.

There was no personal obligation or liability on the part of Prichard for the payment of the $110,000 or any part of it and no duty devolved on him in respect thereto except to account for and pay over to the Oklahoma Company one-half of the gross proceeds he might realize from the properties until the stipulated amount due it had been paid. Narrowly stated, the precise point here is whether, by reason of its contract right to be paid one-half of *the gross proceeds of oil produced from the properties* involved, the Oklahoma Company had such an equitable or economic interest in those properties as would make amounts it received out of such gross proceeds its income direct from the properties, and upon which it would be entitled to a deduction for depletion, and would exclude such amounts from Prichard's income. The Appeals Court held that because, in its transfer of the legal title to the properties, it did not except and reserve a retained interest in them, and because the contract recited that it should have a lien on one-half of the oil and gas produced and fee interest in the properties until it had been paid the specified sum, it had no equitable or economic interest in them and all income therefrom was Prichard's income and the payments to it were cash payments made out of his own funds upon deferred installments of the purchase price.

The Appeals Court distinguishes the case of *Thomas v. Perkins*, 301 U. S. 655, because under the contract involved

in that case the portion of the purchase price of the oil and gas leases transferred to be paid out of oil production, was payable direct to the sellers from the pipe line company which purchased the oil, and because it is stated in the opinion that no lien was reserved by the sellers on the property transferred. The transfer of the leases in that case was of the absolute and complete legal title with a contract provision for the payments out of oil. But the decision in *Thomas* v. *Perkins* is not made to turn on the fact that the in-oil payments were made directly by the pipe line purchaser of the oil instead of through the medium of the assignee of the lease, nor on the fact that no lien was retained, and except in those two respects the facts there are identical with the facts here.

Surely it could make no difference in the principle of law applicable that here the payment out of oil production went first to Prichard and was by him pursuant to the contract deposited in bank and at stated intervals paid over to the Oklahoma Company. The result is precisely the same as though one-half the gross proceeds from oil sales had been paid direct by the purchasing pipe line company to the Oklahoma Company. Prichard had no ownership of this one-half of the gross proceeds from the sale of oil. It could not be his money and could not be diverted and used by him for any purpose of his own. It was money in his hands that belonged and was payable to the Oklahoma Company and all that he could rightfully do was deposit it in bank and pay it over as provided in the contract. His function was merely that of a receiving and transmitting

station from the pipe line purchaser to the Oklahoma Company.

Since *Palmer* v. *Bender*, 287 U. S. 551. it has never been held by the Board of Tax Appeals, nor previously by any court that one who had the right to receive a sum of money out of oil to be produced from a certain property, and from no other source, had to have an interest in the legal title to such property before receipts from such oil production were income direct to him, and upon which he was entitled to a deduction for depletion of his interest in the oil reserve in the property.

If the owner of the oil right to such an in-oil payment was entitled to a depletion deduction on the amounts so received, and this right is no longer anywhere in dispute, then such payments could not also be income to the holder of fee title and operator of the property, for if so, he would be entitled to a deduction for depletion on such income, and deduction of double depletion may not be allowed. *Helvering* v. *Twin Bell Oil Syndicate*, 293 U. S. 312.

In *Commissioner* v. *Fleming* (5th C. C. A.) 1936, 82 F. (2d) 324, the facts were that the owners of certain oil and gas leases:

> "Agreed with a purchaser to sell and convey by proper assignment and transfer all their entire interest in and to the above described oil and gas lease and oil, gas and other minerals produced therefrom. * * * As consideration for said property second party hereby contracts to pay first parties in the proportion of their respective interests * * * $1,000,000 in cash * * * upon the execution and delivery by said first parties of proper

legal instruments of conveyance * * * and $1,000,000 out of one-fourth of all oil, gas and other minerals produced from said working interest in said lease, being one-half of the interest hereby conveyed; said $1,000,000 is not and never shall be a personal obligation or liability against the second party, but shall be paid only out of the products if, as and when produced and sold from the said premises.'"

Thus in that case there was no reserved or retained interest in the legal title to the lease assigned and there was no provision for the payment of the in-oil payments by the pipe line company which purchased the oil, but the purchaser "*contracts* to pay * * * $1,000,000 out of a one-fourth of all oil, gas, etc."

Construing this provision of the assignment of the lease the Court said:

"The purchaser was not bound personally for these payments. If the oil ran short or proved nonexistent, the taxpayer was a proportional loser. While the contract was phrased as though the lease and all the oil were sold, and as though the proceeds were to be paid back to the seller, the real essence of the transaction was that the lease was sold and all the oil except that whose proceeds were to come to the selling taxpayer. The conveyances executed when the cash was paid might very appropriately have reserved or excepted sufficient oil from one-half of that thereafter run to pay the agreed sum. It is true that no royalty to continue indefinitely was reserved, and that the reservation was limited not to so many barrels nor to such a length of time, but to so much oil as would sell for the agreed sum. But it was in effect an exception or reservation of oil. The thing sold for the cash consideration was the lease and all the oil except that so reserved."

There is no possible distinction between that case and the instant case, nor is there any possible distinction between the instant case and the following cases, all of which make the same holding as the Fleming case:

Commissioner v. *Williams* (5th C. C. A.) (1936), 82 F. (2d) 328.

Commissioner v. *Elliott Petroleum Co.* (9th C. C. A.) (1936), 82 F. (2d) 193.

Holly Development Co. v. *Commissioner* (9th C. C. A.) (1937), 93 F. (2d) 146.

Spalding v. *United States* (9th C. C. A.) (1938), 97 F. (2d) 697 (Certiorari denied, 305 U. S. 571).

Dearing v. *Commissioner* (5th C. C. A (1939), 102 F. (2d) 91.

Ortiz Oil Corp. v. *Commissioner* (5th C. C. A.) (1939), 102 F. (2d) 508.

Perkins v. *Thomas* (5th C. C. A.) (1936), 86 F. (2d) 954.

In the latter case which was affirmed in *Thomas* v. *Perkins*, *supra*, the Court, speaking of the in-oil payment, said:

> "But the portion of the proceeds going to the transferors is not income to the transferees. It is not the proceeds of the transferees' oil paid over to the transferors in discharge of an obligation."

So in the instant case the proceeds of the oil payable to the Oklahoma Company was not income to Prichard. It was not the proceeds of his oil paid over to the Oklahoma Company in discharge of an obligation.

In *Holly Development Co.* v. *Commissioner*, *supra*, there was a contract by which:

> "Argonaut, in consideration of $10.00 and the covenants, granted, sold, assigned and transferred to Sinsheimer certain oil leases,"

and by which:

> "Argonaut agreed to immediately put Sinsheimer in possession of the premises whereupon he was to take charge of operations and it also agreed to execute and deliver the necessary instruments to convey title to the leases. * * * All of the proceeds from the production of the wells was to be received by Sinsheimer,"

who was to pay therefrom rentals and royalties and operating expenses and to Argonaut "$6,000 per month until it should have received $120,000." Sinsheimer's title and rights were assigned to the petitioner.

In construing this agreement the Court said that the in-oil payments were income to Argonaut and not to the petitioner "because by the agreement referred to, Argonaut excepted and reserved to itself an interest in the lease and in the oil."

Practically all the cases cited above herein are cited by the Court in support of that statement. There is no possible distinction in legal effect between the contract involved in that case and the conveyances pursuant thereto and the contract involved in this case and the conveyances pursuant thereto, except that in that case it does not appear that the contract provided that the transferor should have a lien on the property transferred or the oil production from it to secure the in-oil payments.

In the only cases dealing with a contract and assignment where a lien was reserved, so far as we know, it has been held that the reservation of the lien was for the purpose of securing the performance of the contract by the transferee, and did not prevent the transferor from retaining and holding an equitable or economic interest in the property transferred.

In *Ortiz Oil Company*, 37 B. T. A. 656, that company agreed with Westbrook and Thompson for a cash consideration to pay $350,000 out of oil to be produced from properties owned by it. The contract provided that in event the company violated the provisions of the contract, the whole sum might be declared:

> "Immediately due and payable, and they shall have automatically at that time a lien on said oil and gas leases and leasehold and all personal property thereon or used and obtained in connection therewith, and all wells and production, and all of the rights, title and interest of Ortiz Oil Company, in and to the same, which said lien may be foreclosed in Court the same as a Vendors Lien, Mortgage Lien, or any other lien" (Page 659).

Ortiz Oil Company contended that the transaction was a loan by Westbrook and Thompson, and not the purchase of an interest in the oil and gas leases and that all oil production therefrom was its income upon which it was entitled to a deduction for depletion, and urged that the giving of the lien negatived the claim that Westbrook and Thompson had an interest in the property.

In passing on this the Board said:

"Such portions of the production belonged to and constituted property of Westbrook and Thompson, and petitioner was obligated only to pay over and account to them therefor, when produced. The lien given to Westbrook and Thompson was not intended to secure the repayment of a loan, but to insure that petitioner would adhere to and perform the conditions of the contract and 'pay and account' to them for their share of the oil when produced.

"Petitioner was to develop and operate the properties, and pay all expenses. Westbrook and Thompson acquired an 'overriding interest,' their portions of the oil runs being net to them. Westbrook and Thompson paid the money in exchange for an agreed interest in any oil and gas or other minerals that might be 'produced, saved and sold' from petitioner's properties. If none were produced, they lost their money, and petitioner was under no obligation to repay it. (Page 664).

* * * * * * * * *

"The right to share in the oil produced constituted an interest in the oil in place. Hence, the right of Westbrook and Thompson to their proportion of the oil and gas, or proceeds from sales, upon production, constituted an economic interest in the properties, to the extent of the amount agreed upon. Likewise, the right of petitioner to the balance of production constituted an economic interest in the properties. Proceeds from sales of production, therefore, constituted income to Westbrook and Thompson to the extent of the proportion received by them, and the balance only constituted gross income to petitioner" (Page 665).

In support of its holding the Board cites the same court cases cited herein. The decision of the Board was affirmed

on review by the Fifth Circuit Court of Appeals in *Ortiz Oil Co.* v. *Commissioner*, *supra*. The Court makes substantially the same holding in substantially the same language as the Board and cites the same authorities.

In *Wilbert Mineral Corporation*, 38 B. T. A. 355, the facts were that the owners of land sold and conveyed it in fee simple absolute to a corporation under an agreement whereby the vendor was to receive $400,000 "from the first revenues earned or received either by way of lease, royalties or otherwise from the oil, gas and other mineral rights in and under the lands" conveyed. The vendee was a corporation and it executed a mortgage and pledged corporate stock to secure the payment of said sum. The Board, after an elaborate review of the authorities, held that the mortgage and pledge were merely security for the performance of the contract on the part of the vendee. In the opinion it is said:

> "We think that the mortgage and pledge should be regarded merely as precautionary measures to guarantee the carrying out of the intention of all the parties concerned, namely, that petitioner was not to enjoy any of the revenue from the mineral rights until the Lumber Co. had received the first $400,000 from that source. *Cf. Ortiz Oil Co.*, 37 B.T.A. 656. In other words, we think the controlling fact is that every precaution was taken to make sure that the first $400,000 of 'revenues earned or received, either by way of lease, royalties or otherwise from the oil, gas and other mineral rights in and under the said lands' would go to the Lumber Co., to be used in paying its debts and the debts of the Planting Co., which it took over in April,

1929. It was a reservation of income to the grantors out of the lands conveyed and was not purchase money. *Perkins* v. *Thomas*, *supra*" (Page 366).

And in *Alexander* v. *Continental Petroleum Company* (10th C. C. A.) (1933), 63 F. (2d) 927, the same court that decided this case below, but with a different personnel, held exactly contrary to its holding in the instant case with respect to the effect of an absolute transfer of title to oil and gas leases and the execution of a lien thereon to secure part of the cash purchase price, which transfer was made pursuant to a contract that the transferor should receive $2,471,241 out of one-half of the lessee's assigned interest in the oil produced. It was there contended by the Government's representative, Alexander, collector, that the transfer of the leases was an outright sale, that the in-oil payments were income to the assignee, and that the assignor was not entitled to the deduction of an allowance for depletion on such in-oil payments which it received. The Court said:

"There were provisions for securing the payments by liens, for the sale of the equipment used or held for use upon the leases, and for the delivery of abstracts of title. * * *

"When the notes were paid the liens were to be released, and on the payment in oil the reservation thereof was to be satisfied. * * *

"The defendant contends, in substance, that the transfer of the leases was absolute and as a result left no reserved interest in the vendor subject to depletion. We may agree that the transfer was a sale of the leases.

> But it was not an end of the plaintiff's interest in the production of the oil."

So here it may be agreed that the transaction was a sale of the properties from the Oklahoma Company to Prichard. But that was not an end of the Oklahoma Company's interest in the production of the oil, and if the execution of express liens on the leases assigned in the above case was not sufficiently significant there to defeat the vendor's claim of a reserved interest in the oil production, no reason appears why the mere recital in the contract that the Oklahoma Company claimed a lien on that part of the property out of which it was to receive $110,000 should defeat its claim, if it made such claim, that this sum was income from in-oil payments direct from the property upon which it was entitled to the deduction of a depletion allowance. If it was entitled to depletion allowance on those in-oil payments, then they could not have been income to Prichard at the same time. *Helvering* v. *Twin Bell Oil Syndicate*, 293 U. S. 312; *Thomas* v. *Perkins*, 301 U. S. 655. In the latter case the Court said, in construing the assignment there under consideration, which was itself an absolute transfer of the leases:

> "We need not decide whether technical title to the oil while in the ground was in assignors, or in assignee."

Of the Circuit Court of Appeals cases cited above, the Holly Development Co., the Spalding, the Dearing, and the Ortiz Oil Corporation cases have been decided since *Thomas* v. *Perkins*. In all of these, as well as in all the others cited, *there was an absolute and complete transfer of the*

legal title to the oil properties involved and only a provision by contract that the transferor should receive a sum of money out of subsequent oil production therefrom and not otherwise, and in every case it is held that these in-oil payments were income direct from the property to the transferor, and hence were not income to the transferee owner and operator of the property.

It would serve no useful purpose here to give in any detail the precise facts of each case and analyze or quote the court's decision. This Court will, if it cares to, examine those cases, and if they fully support the petitioners' contention here, which their counsel say they do, this Court will so recognize them.

For emphasis we repeat that since *Palmer* v. *Bender*, 287 U. S. 551, no court has held that the ownership of the legal title or any interest in the legal title to an oil producing property, or the ownership of oil and gas in place in the ground, was necessary to require one who had a right to receive a sum of money from oil produced from such property and not otherwise, to return sums so received as his income direct from the property, and to entitle him to an al' wance for depletion on such income. This is recognized in *Thomas* v. *Perkins* and in all the cases cited herein both before and after that case.

In the instant case the only reason given by the Court below for not following *Thomas* v. *Perkins* was that here there was an absolute transfer of the legal title and a recital in the contract of sale that the seller would claim a

lien for the amounts to be received out of the property, and that the contract made provision for releasing this lien. *In every case cited herein there is the express statement or plain implication in the contract involved that a release or satisfaction of the right to share in the oil production would be executed when the stipulated amount due the transferor had been fully paid.* Indeed, this would follow as a matter of course without any provision concerning it. The lien specified in the instant case is no more than the vendor's lien given to the Oklahoma Company by statute upon the transfer of the property with part of the purchase price remaining unpaid. There can be no significance in the mentioning of this lien and the provisions for the release of Prichard's obligation to pay over and account when the specified sum had been paid in full.

In the Court below the respondent urged that the cases of *Helvering* v. *Bankline Oil Co.* (1938), 303 U. S. 362; *Helvering* v. *O'Donnell* (1938), 303 U. S. 370, and *Helvering* v. *Elbe Oil Land Development Company* (1938), 303 U. S. 372, were contrary to the petitioners' contention. But that Court made no reference to these cases and its decision is not in any way based on them. They are each clearly distinguishable on the facts from the instant case, and there is no need for petitioners to point out the grounds of distinction. It is sufficient to say that none of them present a state of facts wherein a taxpayer owning and having capital investment in oil producing properties has transferred them to another with the stipulated provision in the contract for their sale and transfer that the transferor

should receive a specified sum out of a portion of the gross proceeds from oil production from them. Under those decisions the transferor in a transaction such as that stated, has a retained capital investment in the properties transferred in the form of an equitable or economic interest in the oil and gas deposit in them.

In the Bankline case the taxpayer was a mere contract purchaser of casinghead gas and did not have and had never had any capital investment in the properties producing the gas. In the O'Donnell case the taxpayer merely owned stock in a corporation which owned oil properties and upon the sale of the stock received as part consideration an agreement for a share in the net profits from the operation of the properties which was merely a personal covenant of his transferee. He did not have and had never had any capital investment in the oil properties. In the Elbe Oil case the taxpayer made an outright sale of oil and gas properties for a cash consideration, payable in installments, and a further provision that after the transferee had been reimbursed for all of its expense in the acquisition, development and operation of the properties, then the transferor should receive one-third of the net profits resulting from production and operation. The taxpayer claimed that the cash payments on the purchase price were bonuses or advance royalties and that it was entitled to a deduction of a depletion allowance on such payments in excess of its cost in the properties. The Court said that these cash payments were the purchase price on an outright sale of the property. The question of the character of the trans-

feror's share in the ultimate net profits from the properties, if there ever should be any, was not before the court. In none of these cases is *Thomas* v. *Perkins* modified, criticized or qualified in any respect, but wherever referred to, it is cited or quoted with approval.

We may add that the petitioners' controversy with the Government in this case is not whether the payment to the Oklahoma Company out of oil production from the property is or is not taxable income, but it is whether those payments are taxable income to petitioners or to the Oklahoma Company. That company owned and had a capital investment in the properties before the transfer of them and by its contract of sale retained an interest and capital investment in them. In so far as the in-oil payments here involved are concerned, they were a realization upon its retained capital investment in those properties.

This Court ought to grant the writs of certiorari in this case and reconcile the conflict between the decisions of the various Circuit Courts of Appeals cited under this proposition and the decision of the court below in the instant case. This even if all that is needful is to point out that this case comes within and is controlled by *Thomas* v. *Perkins*, otherwise sooner or later those Circuit Courts of Appeals will reaffirm their previous decisions and refuse to follow the Tenth Circuit in the instant case, and the precise question here presented will again come before this Court for determination.

Both the Board and the court below cite with approval *Comar Oil Co.* v. *Burnet* (8th C. C. A.), 64 Fed. (2d) 965, which this Court expressly held in conflict with *Thomas* v. *Perkins, supra.*

So we conclude on this proposition that under all pertinent decisions from *Palmer* v. *Bender* down to the instant case, one who has a capital investment in and owns an oil property by title in fee simple absolute and sells it to another, and transfers it to the purchaser by the same kind of title; and by the contract of sale reserves a right or stipulates that he shall have the right, to receive a sum of money out of the gross proceeds of oil to be produced, if, as and when produced, and not otherwise, has such an economic interest in that property as to make such in-oil payments when received, income direct to him from the property and not income to or through the transferee and owner and operator of the property, and he is required to include such in-oil payments in his gross income for tax purposes and is entitled to the deduction therefrom of allowances for depletion. If this is a correct statement of the law, then the in-oil payments here in controversy could not be income to the petitioners.

Second Proposition

Under the terms of the Contract between the Oklahoma Company and Prichard he took the legal title to the properties involved by transfer and conveyance from the company as its trustee or agent or attorney in fact and repository of title for the purpose of operating and/or selling such properties and paying over to it one-half of the gross proceeds so realized therefrom up to $110,000 and hence all sums so paid to it were income direct to it from the properties and were never income to Prichard.

Petitioners contend that the foregoing states a proposition of general law and that the decision of the court below to the contrary is untenable and in conflict with the weight of authority. The principle of general law that one who serves as a mere instrumentality or agency for collecting, receiving and paying over money to another to whom it belongs, has no ownership in such money, nor any legal title or interest in it other than as a custodian, and if there is gain and profit to some one in the money which he thus collects and pays over such gain and profit is that of his principal, is so fundamental that no authorities need be presented to support it.

The petitioners' further contention under this proposition is that the decision of the court below is in direct conflict with the decisions of other Circuit Courts of Appeals where the same question is involved on similar states of fact. These decisions support the provision of general law above stated and apply it to specific states of fact such as those here involved. The number of cases so holding is

not exhausted by those here presented but the ones presented are sufficient to establish the petitioners' contention.

In *Shellabarger* v. *Commissioner* (7th C. C. A.) (1930), 38 Fed. (2d) 566, a father died testate and bequeathed the bulk of his estate to his daughter, Maud, and a nominal amount to his daughter, Georgia. To settle a threatened contest Maud agreed to give Georgia half of a $20,000 legacy and to pay to her as received for the period of her life 3/10 of the net income from two trusts created by the will and an additional 1/5 to a bank as trustee for the use of Georgia's descendants.

The Commissioner held that this 3/10 and 1/5 of the income from the trust was Maud's income and subject to tax in her hands. The Board of Tax Appeals sustained the Commissioner and the Circuit Court of Appeals reversed the Board.

The Court said:

> "So in the case before us it is quite immaterial whether there was employed language purporting to convey a half interest in the net income, or agreeing to pay over the half as it was received—the result is the same.
>
> "As the fund was paid over to Maud, the interest of Georgia and the bank immediately attached, and Maud became in equity a trustee for the benefit of Georgia and the bank. * * * The valid agreement to pay as received half of the income of the trusts conferred an equitable lien on the fund when it came into existence. *Ingersoll* v. *Coram*, 211 U. S. 335, 29 S. Ct. 92, 53 L. Ed. 208.

"While the whole of the net income from the trusts was physically received by Maud, the half did not accrue to her as her income, but on the instant of receiving it she held it in trust for Georgia and the bank, and it was in good faith paid over as received, pursuant to her valid and binding contract."

So here while the whole of the gross proceeds or revenues from the properties was physically received by Prichard, the half thereof was not his income, but on the instant of receiving it, he held it in trust for the Oklahoma Company and it was in good faith paid over as received pursuant to the valid and binding contract. If the decision of the Seventh Circuit Court of Appeals in the above case is right, then the decision of the Tenth Circuit Court of Appeals in this case is wrong.

In *Bettendorf* v. *Commissioner of Internal Revenue* (8th C. C. A) (1931), 49 Fed. (2d) 173, the facts were that Catherine Bettendorf transferred certain corporate stock to her son, Joseph, by a written contract which provided that he should pay to her as long as she lived all earnings and dividends paid on any or all of the stock except a stock dividend, which, if declared, would be his property.

The Commissioner ruled that earnings on this stock were income to Joseph and subject to tax in his hands before being paid over to Catherine. The Board of Tax Appeals upheld the Commissioner. The Circuit Court of Appeals reversed the Board.

In its opinion the Court said:

"By her contract, however, she transferred the legal

title to the stock, but by the terms of this same contract she retained and reserved to herself the right to the income during her life. The income was therefore at no time that of the petitioner, because by the very contract under which he held the legal title he was bound to account to the donor for the income. The contract required that the petitioner account only for such income as accrued, and not for a specified sum. He was not chargeable personally with the income from the stock, except as and when it should be received by him.

* * * * * *

"We must assume that it was not the purpose of the [revenue] act to penalize an individual because he might be the innocent agency by or through whom a substantial income was derived for some one else. The government will not restore to sharp practice, nor invoke technical construction or fiction, which will manifestly thwart the good-faith intention of its taxpayers, for the purpose of visiting a tax burden upon one who in fact did not, except by construction, derive any beneficial income from the transaction. The income which petitioner received from these securities was not the income with which one pays debts. By this contract, Catherine Bettendorf made a gift of the securities, receiving nothing in exchange, but she retained, for the period of her own life, the right to the income. The petitioner, by the terms of the contract, assented to this reservation, and he thereby became a trustee, and was required to account to his mother for the earnings received."

There is no distinction upon the facts or in the rule of law applicable between that case and this one.

In *Central Life Assur. Soc. Mut.* v. *Commissioner of Internal Revenue* (8th C. C. A.) (1931), 51 Fed. (2d) 939, the Central Life Assurance Society of the United States sold and assigned its insurance business to the Central Life Assurance Society Mutual with a provision in the contract that the purchasing company should pay to the stockholders of the selling company the earnings from the nonparticipating business sold and transferred for a period of 22 years.

The Commissioner held that the earnings from the nonparticipating business were income to the purchasing company and subject to tax in its hands before being paid over to the stockholders of the selling company under the contract The Board of Tax Appeals upheld the Commissioner. The Circuit Court of Appeals reversed the Board.

In the opinion the Court said:

> "The issue here is whether those earnings constituted income of the petitioner, in a taxable sense, or were income of the stockholders. The contention of the petitioner is that it was a trustee of such earnings for the benefit of the stockholders.
>
> "Tax laws are essentially practical in their purposes and application, and the federal income tax laws are no exception. While, for purposes of convenience and certainty in collection of such taxes, it is sometimes provided that those who collect income for others shall pay therefrom the taxes thereon, yet a cardinal purpose of the income tax laws is to tax the income to the person who has the right or beneficial interest therein, and not to throw the burden upon a mere collector or conduit through whom or which the income passes. (Citing cases.) * * * It is unnecessary to de-

termine whether the relationship here is technically a fullclothed trust or is something else, although the facts here may well be held to establish a trust relation as to this income.***The undisputed fact is that the petitioner bound itself to pay to designated persons any earnings there may be for a period of twenty-two years from the date hereof, from the nonparticipating business hereby and hereunder transferred. * * * These earnings never became the absolute property of petitioner, and it could lawfully do with them but one thing, which was to pay them over in accordance with the contract. It secured no beneficial interest whatsoever from them. There was as complete a segregation of these earnings as could possibly be made under the circumstances."

The petitioner's contention in the above case is precisely the contention of the petitioners here. There is no essential distinction on the facts between that case and this one and if the Eighth Circuit Court of Appeals was right in that case, the Tenth Circuit Court of Appeals is wrong in this one.

In *Helvering* v. *Falk* (1934), 291 U. S. 183, this Court had before it certain trusts in mining properties, part of the income from which was required to be distributed to beneficiaries, and the question was whether they had the right to depletion allowances on the amounts so distributed. Of the trust deed the Court said:

"After providing for payment of taxes, expenses, etc., the deed directed: 'Except as above authorized to be expended, paid out or retained, all proceeds which shall come to the hands of the Trustees from said property or from any use which may be made thereof, or from any source whatsoever hereunder as received by

the Trustees shall belong to and be the property of the beneficiaries hereunder to be distributed and paid over to them in proportion to and in accordance with their respective interests as shown herein, or as the same shall from time to time appear as hereinafter provided."

Then after an extended discussion the Court reached the conclusion that the distributions to the beneficiaries were income to them direct from the mining properties through the intervention of the trustees and that they were entitled to appropriate depletion allowances. The Court said:

"Here the governing instruments directed payment to the beneficiaries of the entire proceeds, less expenditures, etc., and the trustees must be regarded as a mere conduit for passing them to the beneficial owners. Part only of the proceeds was subjected to taxation. The other part was left untaxed and remained so in the hands of the beneficiaries."

It is believed that the holding in this case is pertinent here, for that Prichard must be regarded as a mere conduit for passing one-half of the gross proceeds of whatever sort realized from the properties to the beneficial owner thereof, the Oklahoma Company.

A number of Board of Tax Appeals decisions could be cited in support of petitioners' contention here, but two are sufficient for the purpose. See:

Stephen J. Hallahan, 14 B. T. A. 584, 596, 597.

Mark D Eagleton, 35 B. T. A. 551, 562.

If the authorities cited are not convincing of the soundness of the proposition under consideration, more of the same kind would not be.

It seems too plain for dispute that no part of the proceeds coming to Prichard from the properties and by him paid under his contract obligation to the Oklahoma Company was in any sense his income or his money. This was not the kind of income with which one pays debts. He could not divert it to any use or purpose other than payment over to the Oklahoma Company. If he had done so, he would have been guilty of conversion of funds belonging to that company and possibly of embezzlement. It is not conceivable that he was or could have been anything more than a trustee of the legal title to the properties for the benefit of the Oklahoma Company for the realization out of one-half the gross proceeds derived from them of the $110,000 expressly reserved to it by the contract. It is fundamentally unjust that he should be required to pay income tax on this money. The property he acquired was that described in the contract less an interest of $110,000 in value carved out of it and retained by the Oklahoma Company.

It was urged by respondent in the court below that Prichard was using the sums paid to the Oklahoma Company to acquire valuable properties and a large capital investment for himself. The obvious error in this is that he never acquired any right to or interest in the $110,000 in question and presumably paid full value, by the down payment in cash of $50,000 and the expense of operating the property, for the estate or interest he acquired therein which was the

full title subject to or charged with the payment of $110,000. It might very well have been that the property would prove to be not worth what he was paying for it, charged as it was with the burden of $110,000 out of one-half of the gross proceeds from it. There was a speculative element in his contract, and if it turned out to be profitable, he was certainly entitled to the benefit of his bargain. The record does not show, and it is not material here that it should show, the amount of taxes and special assessments against the real estate transferred, nor whether these were less than, equalled or exceeded its value. It is specifically provided in the contract that he took the properties charged with that tax liability (R. 23).

The question here is simply illustrated: A owns an interest-bearing promissory note for $1,000. He sells, endorses without recourse, and delivers it to B for $250 cash and B's agreement to try to collect it and, if, as and when he collects, to pay to A half of all sums collected until A has so received $500. B collects $800 of which he pays A $400. Query: Is this $400 gain, profit and taxable income to B? Substitute the Oklahoma Company for A, and properties for the note and Prichard for B, and we have the present case.

It is sufficient to say that none of the $110,000 reserved and payable to the Oklahoma Company out of one-half the gross proceeds realized from the the property was or could have been Prichard's money or income. Under the authorities presented under the preceding proposition the Oklahoma company was entitled to a depletion allow-

ance on the in-oil payment. This itself is decisive of the question whether those in-oil payments were income to Prichard, for if the Oklahoma Company was entitled to a depletion allowance on them, he could not be.

CONCLUSION

The petitioners say in conclusion that the decision of the Appeals Court is in direct conflict with the decisions of other Circuit Courts of Appeals and apparently in conflict with the decisions of this Court which have been cited herein under their first proposition, and is likewise in conflict with the principles of general law stated in their second proposition and with the decisions of the Circuit Courts of Appeals and of this Court there cited. They contend that not only is the decision of the Appeals Court in conflict with those decisions, but it is fundamentally wrong and has the effect to impose a tax on petitioners on alleged income which was never really theirs. They repeat that if their contention is sustained, it does not mean that the income in dispute will escape taxation, but means only that it will be taxed to the one whose income it actually and really is and not be taxed to one who had no right or title to it but served merely as a collector and channel or conduit for receiving it and passing it on to its actual owner.

They ask that this Court grant the writs of certiorari as prayed for and review the decision of the court below.

Respectfully submitted,

CHAS. H. GARNETT,
Attorney for Petitioners.

Nos. 682, 683

In the Supreme Court of the United States

OCTOBER TERM, 1939

J. STEVE ANDERSON, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

L. H. PRICHARD, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

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ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 14–17) is unreported. The opinion of the Circuit Court of Appeals for the Tenth Circuit (R. 79–84) is reported in 107 F. (2d) 459.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Tenth Circuit was entered on November 1, 1939 (R. 84). Petition for writs of certiorari was filed January 30, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

A sells oil lands and rights to B for $50,000, plus an additional $110,000 to be paid out of one-half of the proceeds received by B from oil and gas produced from the properties and from the sale of any of the lands conveyed to him. In 1932, B received income by way of proceeds from the properties, one-half of which he paid over to A in pursuance of the above arrangement. Is B to be relieved of income tax upon the proceeds thus paid over to A?

STATUTE INVOLVED

Revenue Act of 1932, c. 209, 47 Stat. 169:

> SEC. 22. GROSS INCOME.
>
> (a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; * * *.

STATEMENT

The facts, as found by the Board of Tax Appeals (R. 14–16), may be summarized as follows:

On March 19, 1931, Oklahoma City Company entered into a written contract with petitioner Prichard providing for the sale to Prichard of certain royalty interests, fee interests, and deferred oil payments in properties in Oklahoma. Prichard agreed to pay the Company $50,000 in cash and also one-half of the proceeds received by him from the sale of oil and gas produced from the properties and from the sale of any of the lands conveyed to him, until the Company had received $110,000 in addition to the $50,000. Interest at the rate of 6 percent per annum was to be paid from proceeds of sales or production upon any unpaid balance of the $110,000. The Company transferred the properties to Prichard immediately but retained a lien upon the properties and products to secure payment of the $110,000 and interest. (R. 14–15.)

In entering into this agreement, Prichard acted not only for himself but also for petitioner Anderson and for one Olsen, as set forth in a declaration of trust dated March 23, 1931. Prichard and Anderson each had a 45 percent interest and Olsen had a 10 percent interest. (R. 15.)

During the tax year 1932, Prichard received all the proceeds from the properties and, pursuant to the contract, distributed one-half of the gross proceeds to the Oklahoma City Company (R. 15). The

Commissioner, in determining deficiencies against both Prichard and Anderson, added to the gross income of each his proportionate share of the amount paid to the Company during the taxable year. This action of the Commissioner was sustained by the Board of Tax Appeals (R. 16), and the court below affirmed (R. 84).

ARGUMENT

On principle, the decision of the court below is entirely correct. The contract of March 19, 1931, provided for an outright sale of the properties to Prichard [1] for a consideration of $160,000, payable $50,000 in cash and $110,000 from one-half of the proceeds from the properties if, as, and when received. After the execution of the contract, all legal and equitable interests in the properties belonged to Prichard (subject only to the Oklahoma Company's lien to secure payment of the $110,000) and all income from the properties was therefore his income. The fact that Prichard was under a contractual obligation to pay over one-half of the proceeds in payment of the purchase price did not affect either the nature of his ownership of the properties or the nature of his interest in the proceeds of the properties. Consequently, the

[1] As above stated, in the transactions with the Oklahoma Company Prichard was acting for himself, for Anderson, and for Olsen, who did not file a petition with this Court. However, for purposes of convenience, we shall discuss the question as though Prichard had acted solely for himself.

court below correctly sustained the Commissioner in including those proceeds in Prichard's gross income.

Thomas v. *Perkins*, 301 U. S. 655, relied upon by petitioner, is distinguishable. That case involved an assignment of oil leases pursuant to which the assignors received $395,000 "to be paid out of the oil produced and saved from the * * * lands, and to be one-fourth of all the oil produced and saved * * * until the full sum * * * is paid * * *" (p. 657). It was agreed between the parties that the $395,000 was payable out of oil only and that it should not be a personal obligation of the assignee. The instrument did not purport to reserve a lien. The court construed the agreement as withholding "from the operation of the grant one-fourth of the oil to be produced and saved up to an amount sufficient when sold to yield $395,000" (p. 659). This construction was based upon the provisions for payment in oil only, the absence of any obligation of the assignee to pay in oil or in money, and the failure of the assignors to take any security by way of lien. It was also supported by the fact that when the oil was sold, the purchaser was furnished with a division order designating the quantities of the oil belonging to the assignors and the assignee and directing that a proportionate part of the purchase price be paid directly to the assignors. Under these circumstances, the Court held that the moneys received by the assignors from

the sale of the oil was not income to the assignee. The basis of the decision was that ownership of the oil from the sale of which these moneys were derived had not been conveyed to the assignee but remained in the assignors.

The contract here involved is substantially different from the instrument of assignment involved in the *Thomas* case. The provisions of the contract evidence the unequivocal intention of the parties to make an absolute sale of the properties for $50,000 in cash and $110,000 payable out of one-half of the proceeds from sales of oil, gas, and land. The Oklahoma Company reserved nothing more than a lien on one-half of the proceeds to secure the unpaid balance of the purchase price. Plainly the reservation of this lien negatives any contention that the Company intended to withhold from the grant one-half of the oil and gas to be produced up to an amount sufficient when sold to pay the unpaid purchase price; the vendor could not retain title and at the same time reserve a lien. Moreover, the contract did not provide for payments in oil, as did the assignment in the *Thomas* case, nor did it provide for direct payment to the Oklahoma Company by purchasers of the oil and gas of one-half of the purchase price. On the contrary, it expressly provided that the purchase price should be paid directly to Prichard and that he should deposit one-half of the payments to the Oklahoma Company's credit at intervals of ninety days at a designated bank (R. 22). The contract provision for the pay-

ment of interest on any unpaid balance of the $110,000 is also inconsistent with the contention that there was not an outright sale of all of the Company's title and interest in the properties. So, too, is the fact that Prichard had the right to sell and convey the properties and interests covered by the contract and pay the $110,000 out of the proceeds of such sale rather than out of the proceeds of gas and oil produced from the properties. Such a right would seem plainly to negative any idea that the Oklahoma Company retained an interest in the oil in place. Finally, the provision that a copy of the agreement and a "release" be placed in escrow for delivery to Prichard upon full payment of the $110,000 and interest (R. 22) indicates that the parties intended an outright sale; this provision clearly contemplates the extinction of a lien rather than the transfer of title or of a beneficial interest, for which purpose a deed would normally be employed.

The fact that the contract provided for payments out of one-half of the proceeds, up to $110,000, in addition to an immediate cash consideration, does not preclude an absolute transfer to Prichard of all the Oklahoma Company's interest in the properties conveyed. Cf. *Helvering* v. *Elbe Oil Land Co.*, 303 U. S. 372; *Helvering* v. *O'Donnell*, 303 U. S. 370. Nor is a "mere economic advantage" derived from the property "through a contractual relation to the owner" equivalent to the retention of an economic interest or investment in

the property. See *Helvering* v. *Bankline Oil Co.*, 303 U. S. 362, 367; *Helvering* v. *O'Donnell, supra*, at 372.[2]

It is true that the lower federal courts have applied the rule of *Thomas* v. *Perkins* to situations more closely akin to the present case than was the situation in the *Thomas* case itself. *Holly Development Co.* v. *Commissioner*, 93 F. (2d) 146 (C. C. A. 9th); *Commissioner* v. *Elliott Petroleum Corp.*, 82 F. (2d) 193 (C. C. A. 9th); *Spalding* v. *United States*, 97 F. (2d) 697 (C. C. A. 9th), certiorari denied, 305 U. S. 644; *Commissioner* v. *Fleming*, 82 F. (2d) 324 (C. C. A. 5th); *Commissioner* v. *Williams*, 82 F. (2d) 328 (C. C. A. 5th); *Dearing* v. *Commissioner*, 102 F. (2d) 91 (C. C. A. 5th). Each of these cases is distinguishable from the present case on one or more of the grounds set forth above as distinguishing the *Thomas* case. The dis-

[2] Petitioners rely upon *Palmer* v. *Bender*, 287 U. S. 551, in which the Court held that the right to a depletion allowance is not dependent upon the retention of ownership but upon the retention of an economic interest in the oil in place. The taxpayer was held entitled to depletion allowances because, for the transfer of operating rights, he was to receive royalties from production and thus retained an economic interest. In *Helvering* v. *Elbe Oil Land Co.*, 303 U. S. 372, 375–376, however, the Court distinguished payments of the purchase price upon an absolute sale from "bonus" or "royalty" payments within the meaning of its decisions allowing depletion on such payments and held that where the taxpayer disposed of the property it was not entitled to any depletion allowance even though it had a right under the sale contract to participate in the proceeds.

tinctions are not in every case as satisfactory as in the *Thomas* case itself. For example, the principal difference between the case at bar and *Holly Development Co.* v. *Commissioner, supra,* seems to be the absence of a lien in the *Holly* case and the right of the vendee in the present case to sell the properties and pay the remainder of the purchase price from the proceeds of the sale. However, because under the rule in *Thomas* v. *Perkins,* decision seems to turn upon the nature of the particular instrument involved in each case, because no question of great importance is involved, and because the decision below, upon the facts here presented, is clearly sound, there is, we believe, no occasion for further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Nos. 682 and 683

In the Supreme Court of the United States

OCTOBER TERM, 1939

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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1939

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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH DISTRICT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 15–16) is unreported. The opinion of the Circuit Court of Appeals for the Tenth Circuit (R. 74–79) is reported in 107 F. (2d) 459.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Tenth Circuit was entered on November 1, 1939 (R. 79). A petition for writs of certiorari was filed January 30, 1940, and granted March 4, 1940. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

A sold oil lands and rights to B for $50,000, plus an additional $110,000 to be paid out of one-half of the proceeds received by B from oil and gas produced from the properties and from the sale of any of the lands conveyed to him. In 1932 B received income by way of proceeds from the properties, one-half of which he paid over to A in pursuance of the above arrangement. Is B to be relieved of income tax upon the proceeds thus paid over to A?

STATUTE INVOLVED

Revenue Act of 1932, c. 209, 47 Stat. 169:

> SEC. 22. GROSS INCOME.
>
> (a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; * * *.

STATEMENT[1]

The facts, as found by the Board of Tax Appeals (R. 14–15), may be summarized as follows:

On March 19, 1931, Oklahoma City Company entered into a written contract with petitioner Prichard providing for the sale to Prichard of certain royalty interests, fee interests, and deferred oil payments in properties in Oklahoma. Prichard agreed to pay the Company $50,000 in cash and also one-half of the proceeds received by him from the sale of oil and gas produced from the properties and from the sale of any of the lands conveyed to him, until the Company had received $110,000 in addition to the $50,000. Interest at the rate of 6% per annum was to be paid from proceeds of sales or production upon any unpaid balance of the $110,000. The Company transferred the properties to Prichard immediately but retained a lien upon the properties and products to secure payment of the $110,000 and interest. (R. 14, 16–23.)

On March 23, 1931, Prichard assigned an interest in the properties covered by this contract to

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[1] These two cases present precisely the same questions of law arising upon the same state of facts. In the Board of Tax Appeals, the cases were consolidated with each other and with a similar proceeding brought by one Olsen. The findings of fact made by the Board relate to all three cases and all of them were disposed of in a single opinion. Each of the petitioners before the Board filed a petition for review in the court below, where the cases were also consolidated and disposed of in a single opinion. Olsen did not file a petition for a writ of certiorari.

Oil Brokerage and Investment Company (hereinafter referred to as Investment Company) in consideration of $50,000 cash. The contract of assignment provided that the Investment Company was to receive all revenues received from the properties by Prichard until the Investment Company had received $50,000 and that thereafter the Investment Company and Prichard were each to own an undivided one-half interest in the properties. Prichard agreed that if the revenues were insufficient to reimburse the Investment Company for the $50,000 advanced as consideration for the assignment, he would bear one-half of the loss. (R. 14, 24–25.)

In entering into these agreements Prichard acted not only for himself but also for petitioner Anderson and for one Olsen, as set forth in a declaration of trust dated March 23, 1931. Prichard and Anderson each had a 45 percent interest and Olsen had a ten percent interest. (R. 14, 25–27.)

The gross proceeds from sales and from oil and gas produced from the properties amounted to $55,833.17 in 1931. Prichard received these proceeds and distributed them in equal amounts to the Oklahoma Company and the Investment Company. In 1932, the tax year here involved, the gross proceeds received by Prichard amounted to $81,547.15. He paid one-half of this amount to the Oklahoma Company. To the Investment Company, he paid $23,695.91 (representing the balance necessary to reimburse it for the $50,000 advanced as considera-

tion for the assignment) plus one-half of the remainder. Of the remaining amount, he kept 45 percent, paid Anderson 45 percent, and paid Olsen 10 percent. (R. 15.)

Both Prichard and Anderson reported $3,165.19 as income received during 1932 from these transactions. The Commissioner added $11,276.39 to the income of each, stating in his notice of deficiency that this amount represented "In-oil payments" received in connection with the transaction and not reported as income. (R. 15.) He accordingly determined a deficiency of $1,918.60 against Prichard and $2,724.91 against Anderson.

The Commissioner's action was sustained by the Board of Tax Appeals, which stated (R. 16):

> The Commissioner treated all receipts less depletion as income, and regarded the disbursements to Oklahoma City Company, and perhaps part of those to Oil Brokerage, as payments of the purchase price of $160,000. We can find no error in this action of the Commissioner.

The court below agreed with the Board that the Commissioner had correctly included in the petitioners' gross income the amount of the disbursements to the Oklahoma Company (R. 76–78). It then held that $25,000 of the $50,000 paid to the Investment Company to reimburse it for the amount which it had advanced as consideration for the assignment was not taxable against the petitioners. Being unable to determine from the rec-

ord whether more than $25,000 of the $50,000 had been assessed to the petitioners, it remanded the cases to the Board for determination of this question. (R. 78–79.)

The Government has not sought review of the action of the court below in remanding the cases to the Board for further proceedings in connection with the payments to the Investment Company. The only question presented to this Court, therefore, is whether the court below properly held that petitioners' contractual obligation to pay over one-half of the gross proceeds from the properties to the Oklahoma Company did not relieve petitioners of income tax upon such proceeds. In considering this question, the assignment to the Investment Company may be, and in the ensuing discussion will be, disregarded.

SUMMARY OF ARGUMENT

The contract of March 19, 1931, provided for an outright sale of the properties to petitioners for a consideration of $160,000, payable $50,000 in cash and $110,000 from one-half of the proceeds from the properties if, as, and when received. After the execution of the contract, all legal and equitable interests in the properties belonged to petitioners, subject only to the Oklahoma Company's lien to secure payment of the $110,000. Since petitioners were the absolute owners of the properties, all the income derived from the properties was their income; the fact that they were under a contractual

obligation to pay over one-half of the proceeds from the properties in payment of the purchase price did not affect either the nature of their ownership of the properties or the nature of their interest in the proceeds of the properties.

Thomas v. *Perkins*, 301 U. S. 655, is readily distinguishable. That case involved an assignment of lease providing for oil payments to the assignor. In holding that the assignee was not required to include in his gross income any part of the proceeds of the oil that went to the assignor, the Court expressly based decision upon the particular terms of the instrument of assignment which it construed as withholding from the operation of the grant an amount of oil sufficient, when sold, to yield the amount of the oil payment. The contract here is substantially different. It provided for transfer of all the properties to petitioners without the reservation of any sort of interest except a lien, and its terms clearly negative any contention that the Oklahoma Company withheld from the operation of the grant an amount of oil equivalent, when sold, to the $110,000 which the Company was entitled to receive. Petitioners had the right to sell and convey the properties covered by the contract and pay the $110,000 out of the proceeds of such sale rather than out of the proceeds of gas and oil produced from the properties. This right is plainly inconsistent with the view that the Oklahoma Company retained an interest in the oil and gas in place.

Moreover, in *Thomas* v. *Perkins,* the oil payments were to be made in kind, while in the present case they were to be made in cash. A holding that a lessee who merely produces oil and turns it over to the lessor has not derived income from the oil is not authority for a holding that a lessee who produces and sells oil and receives the proceeds therefrom has not realized income because he is under a contractual obligation to turn over a portion of the proceeds to the lessor in payment of the purchase price.

Palmer v. *Bender,* 287 U. S. 551, is similarly distinguishable. That case involved an assignment of a lease in return for a cash bonus, a future payment of a specified sum to be made out of a percentage of the oil produced, and an excess royalty of one-eighth of all the oil produced. The Court held that the assignors were entitled to a depletion allowance with respect to payments made under this assignment because they had retained a right to share in the oil in place which was depleted by production. In the present case the Oklahoma Company had no right to share in the oil in place and retained no capital investment in the properties; *Palmer* v. *Bender, supra,* is, therefore, inapplicable to the situation here presented.

Petitioner's contention that Prichard acted as a mere instrumentality or agency for collecting, receiving, and paying over to the Oklahoma Company money which belonged to it is necessarily based on

the premise that the Oklahoma Company reserved an interest in the oil in place. Since the premise is without foundation, the contention is devoid of merit.

ARGUMENT

1. On principle, the decision of the court below is entirely correct. The contract of March 19, 1931, provided for an outright sale of the properties to Prichard [2] for a consideration of $160,000, payable $50,000 in cash and $110,000 from one-half of the proceeds from the properties if, as and when received (R. 21). After the execution of the contract, all legal and equitable interests in the properties belonged to Prichard, subject only to the Oklahoma Company's lien to secure payment of the $110,000; as stated in the petition for certiorari (p. 15), "the instruments of transfer * * * were absolute and unqualified assignments and conveyances" and there was "no reservation of any sort of interest, much less any legal interest, specified in those assignments and conveyances" (see also Pet. 5). Since Prichard was the absolute owner of the properties it seems clear that all the income derived from those properties was *his* income, despite the fact that he was under contrac-

[2] As pointed out in the Statement, in the transactions with the Oklahoma Company Prichard was acting for himself, for Anderson and for Olsen, who did not file a petition with this Court. However, for purposes of convenience, we shall discuss the question as though Prichard had acted solely for himself.

tual obligation to pay one-half of it over to the Oklahoma Company after he received it.[3]

It is axiomatic that the statute taxes income to the owner of the property which produces it. *Helvering* v. *Clifford*, No. 383, present Term; *Poe* v. *Seaborn*, 282 U. S. 101. Such taxation may not be avoided by payment of the income to others in accordance with a prearranged plan, because the use to which income derived from property is put after its receipt by the owner of the property is of no consequence. The owner of property is subject to tax on the income from the property even though he has previously made an assignment of the in-

[3] The properties acquired from the Oklahoma Company consisted of "certain royalty interests, fee ownership, and deferred oil payments" (R. 17) and certain "working interests" (R. 19). The gross proceeds from sales and from oil and gas produced from the properties in 1932 amounted to $81,547.15, of which one-half was distributed to the Oklahoma Company. The record does not indicate what portion of the gross proceeds was derived from the production and sale of oil and gas and what portion, if any, was derived from sales of fees and from royalties on leases (R. 16). However, the Commissioner, in determining deficiencies against the petitioners, added $11,276.39 to the gross income of each, explaining that this amount represented "In-oil payments received in connection with the Patterson [Oklahoma City Co.] deal * * *" which had not been reported by petitioners (R. 15, 11, 48). In view of this explanation by the Commissioner, and because the record nowhere discloses how the amount of $11,276.39 was computed, we shall accept for purposes of this review petitioners' statement that "the only income from the properties here in dispute is from oil production" (Pet. 9).

come (see *Reinecke* v. *Smith*, 289 U. S. 172, 177, citing *Lucas* v. *Earl*, 281 U. S. 111, and *Burnet* v. *Leininger*, 285 U. S. 136) or has agreed to apply it to the discharge of an obligation. *Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716; *Reynolds* v. *McMurray*, 60 F. (2d) 843 (C. C. A. 10th), certiorari denied, 287 U. S. 664; *Hill* v. *Commissioner*, 38 F. (2d) 165 (C. C. A. 1st), certiorari denied, 281 U. S. 761. Cf. *Bull* v. *United States*, 295 U. S. 247, 254; *Douglas* v. *Willcuts*, 296 U. S. 1. Since the income here involved was derived from property of which Prichard was the owner, the Commissioner was plainly justified in taxing it to Prichard.

2. *Thomas* v. *Perkins*, 301 U. S. 655, relied upon by petitioners, is clearly distinguishable. That case involved an assignment of oil leases pursuant to which the assignors were to receive $395,000 "to be paid out of the oil produced and saved from the * * * lands, and to be one-fourth of all the oil produced and saved * * * until the full sum * * * is paid * * *" (p. 657). It was agreed between the parties that the $395,000 was payable out of oil only and that it should not be a personal obligation of the asignee. The instrument did not purport to reserve a lien. The Court held that, while the granting clause in the coveyance would be sufficient, if standing alone, to transfer all of the oil to the asignee, the granting clause was

qualified or modified by other parts of the instrument. The Court stated (301 U. S. at 659):

> The provisions for payment to assignors in oil only, the absence of any obligation of the assignee to pay in oil or in money, and the failure of assignors to take any security by way of lien or otherwise unmistakably show *that they intended to withhold from the operation of the grant one-fourth of the oil to be produced and saved up to an amount sufficient when sold to yield $395,000* [italics supplied].

This construction of the assignment was supported by the fact that when the oil was sold, the purchaser was furnished with a division order designating the quantities of the oil belonging to the assignors and the assignee and directing that a proportionate part of the purchase price be paid directly to the assignors. Under these circumstances, the Court held that the moneys received by the assignors from the sale of the oil was not income to the assignee. The basis for the decision was that ownership of the oil from the sale of which these moneys were derived had not been conveyed to the assignee but remained in the assignors.

The contract here involved is substantially different. It provided for a transfer of all of the properties to Prichard and there was no modifying or qualifying language reserving any sort of interest in the Oklahoma Company. The agreement (R. 20) recited that the Oklahoma Company desired "to sell all of its right, title and interest of whatsoever

nature," and agreed to deliver to Prichard good and valid instruments conveying the various interests referred to. Provision was made for an adjustment in the amount of the deferred payments "if for any reason it [Oklahoma Company] should fail to deliver satisfactory title to any of the lots" (R. 20-21). The $110,000 deferred payment drew interest until paid (R. 21), and the Oklahoma Company had a first lien and claim against one-half of the oil and gas production and fee interest (R. 21). The court below pertinently observed (R. 77) that "These provisions are wholly inconsistent with an intent to reserve any interest in the Oklahoma Company other than a lien on the properties or the proceeds derived therefrom. The Oklahoma Company could not retain title to property and at the same time reserve a lien thereon."

Moreover, Prichard had the right to sell and convey the properties and interests covered by the contract and pay the $110,000 out of the proceeds of such sale rather than out of the proceeds of gas and oil produced from the properties. Such a right would seem plainly to negative any idea that the Oklahoma Company retained an interest in the oil in place. Again, the contract did not provide for direct payment to the Oklahoma Company by purchasers of the oil and gas of one-half of the purchase price; on the contrary, it expressly provided that the purchase price should be paid directly to Prichard and that he should deposit one-half of the payments to the Oklahoma Company's credit

at intervals of 90 days at a designated bank (R. 22). Finally, the provision that a copy of the agreement and a "release" be placed in escrow for delivery to Prichard upon full payment of the $110,000 and interest (R. 22) indicates that the parties intended an outright sale; this provision clearly contemplates the extinction of a lien rather than the transfer of title or a beneficial interest, for which purpose a deed would normally be employed.

Accepting the stated premise of the opinion in *Thomas* v. *Perkins*—that the decision was based on a construction of the particular agreement as withholding from the operation of the grant sufficient oil to make the oil payments—the distinctions pointed out above are clearly substantial. There the oil which produced the income was considered not to have been conveyed to the taxpayer and he was therefore held not to be taxable on that income; here, on the other hand, the taxpayers clearly received a conveyance of all the properties and therefore they are taxable on the income derived from the properties. Just such a distinction has been drawn by the lower federal courts and by the Board of Tax Appeals in cases where services, usually by a drilling company, are performed for an operating lessee in consideration of his promise to pay a specified sum out of a percentage of the gross proceeds of the minerals produced. In this situation, it has been held that the person per-

forming the services is entitled to a depletion allowance if he receives an actual assignment of an interest in the minerals in place (*Dearing* v. *Commissioner*, 102 F. (2d) 91 (C. C. A. 5th); *F. H. E. Oil Company* v. *Commissioner*, 41 B. T. A. 130) but is not entitled to such an allowance in the absence of an assignment. *Commissioner* v. *Edwards Drilling Co.*, 95 F. (2d) 719 (C. C. A. 5th); *F. H. E. Oil Co.* v. *Commissioner, supra.*

Another ground for distinguishing this case from *Thomas* v. *Perkins* is the fact that in the *Thomas* case the oil payment was to be made in oil while here it was to be made in cash. A holding that a lessee who simply produces oil and turns it over to the lessor has not realized income from the oil is clearly not authority for a holding that a lessee who produces and sells oil and receives the proceeds therefrom has not realized income because he is under a contractual obligation to turn over a portion of the gross proceeds to the lessor in payment of the purchase price. *Cf. Waggoner Estate* v. *Wichita County*, 273 U. S. 113, 118. A similar distinction between payments in kind and payments in cash has been drawn in cases dealing with the declaration of corporate dividends. *Cf. General Utilities Co.* v. *Helvering*, 296 U. S. 200. And there would seem to be as substantial a difference between payments out of oil production and out of the gross proceeds of such production as there is between payment out of oil production and out of the net proceeds of such production, a distinction drawn

by this Court in *Helvering* v. *Elbe Oil Land Co.*, 303 U. S. 372.[1]

3. Petitioners also rely on *Palmer* v. *Bender*, 287 U. S. 551. That case involved an assignment of a lease in return for a cash bonus, a future payment to be made "out of one-half of the first oil produced and saved" to the extent of $1,000,000, and an additional "excess royalty" of one-eighth of all the oil produced and saved. The question was whether the assignors were entitled to a depletion allowance with respect to payments made under this assignment. The Court held that they were entitled to such an allowance because they had retained "a right to share in the oil produced" and therefore "an economic interest in the oil, in place, which is depleted by production" (p. 557). In the present case, as we have shown, the Oklahoma Company

[1] In several cases the lower federal courts have held that the reservation of an oil payment right constitutes the retention of a capital investment in the property so that the oil payments are taxable as income to the lessor or assignor and the lessor or assignor is entitled to a depletion allowance with respect thereto. *Holly Development Co.* v. *Commissioner*, 93 F. (2d) 146 (C. C. A. 9th); *Commissioner* v. *Elliott Petroleum Corp.*, 82 F. (2d) 193 (C. C. A. 9th); *Fleming* v. *Commissioner*, 82 F. (2d) 324 (C. C. A. 5th); *Commissioner* v. *Williams*, 82 F. (2d) 328 (C. C. A. 5th); *Alexander* v. *Continental Petroleum Co.*, 83 F. (2d) 927 (C. C. A. 10th); *cf. Ortiz Oil Co.* v. *Commissioner*, 102 F. (2d) 508 (C. C. A. 5th). But see *Comar Oil Co.* v. *Burnet*, 64 F. (2d) 965 (C. C. A. 8th). Each of these cases is distinguishable from the present case on one or more of the grounds set forth above as distinguishing *Thomas* v. *Perkins*. However, the distinctions are not in every case satisfactory, and some of the decisions seem wrong in principle for the reasons stated above.

had no right to share in the oil in place and retained no capital investment in the properties; *Palmer* v. *Bender, supra,* is therefore inapplicable to the situation here presented.

Moreover, in the *Bender* case, the Government's argument was that the assignors were entitled to no depletion allowance whatever, and it made no contention that a distinction should be drawn between the royalty interest (the right to receive a percentage of all the oil and gas produced) and the oil payment right (the right to receive a specified sum of money out of a percentage of the first oil produced). The opinion of the Court, therefore, contains no discussion of any possible difference between these two rights but is directed primarily to the proposition that the assignors "retained, by their stipulations for royalties, an economic interest in the oil, in place, identical with that of a lessor" (p. 558).

It would, we submit, be completely unreal from an economic standpoint to treat the right of the Oklahoma Company to receive $110,000 out of one-half of the proceeds from sales of oil, gas, and land as an economic interest in the oil in place, similar to that retained by the holder of the royalty interest in *Palmer* v. *Bender*. In no sense can the right of the Oklahoma Company to the deferred payment of $110,000 be considered an investment in a wasting asset, since depletion, or even exhaustion, of the oil reserves caused by the production necessary to make this payment would not affect the value of the Company's right. Under these circumstances, to

allow the Company a deduction for depletion, similar to the deduction allowed to the taxpayer in *Palmer* v. *Bender*, would be to compensate it for an impairment of capital which it did not suffer. This is even more unrealistic where, as here, the assignment contract provided that the $110,000 could be paid out of the proceeds of the sale of the properties by Prichard, as well as out of the proceeds of the sale of oil and gas produced. Such a provision, as we have pointed out, is entirely inconsistent with the view that the Oklahoma Company retained an economic interest in the oil and gas in-place which was depleted when the payments to it were made.

Moreover, the decision in *Palmer* v. *Bender* was based, in part at least, upon the language of the depletion provisions of the Revenue Act there involved, which provided for a depletion allowance "according to the peculiar conditions in each case". (Revenue Act of 1921, Sec. 214 (a) (10)); this language was deemed to be "broad enough" to cover any person having an economic interest in the oil in place (287 U. S. at 557). The holding that the taxpayers there had such an economic interest as to be entitled to the depletion allowance was made without reference to the question whether the taxpayers, by virtue of this interest, derived income directly from the production and sale of the oil.[5]

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[5] The depletion provision of the Revenue Act of 1932 provides, as an alternative method of computing depletion, that a deduction of 27½ per centum be taken from "gross income from the property" (Sec. 114 (b) (3)); under this

4. It is true, of course, as petitioner contends, that the value of the Oklahoma Company's right to the deferred payment depended in part upon whether the amount of oil which could be produced from the properties would be sufficient to make the payment. This fact, however, clearly does not mean that the Oklahoma Company retained a capital investment in the oil and gas in place. In *Helvering* v. *O'Donnell*, 303 U. S. 370, and *Helvering* v. *Elbe Oil Land Co.*, 303 U. S. 372, the Court held that where oil properties are conveyed under an agreement pursuant to which the taxpayer is to receive a percentage of the net profits of production and operation, the taxpayer has only a personal covenant, and not a capital investment in the oil and gas in place. The value of the personal covenant held by the taxpayers in those cases depended, of course, upon the amount of oil and gas which could be produced from the properties, but this fact was not deemed to entitle them to a depletion allowance because they had no capital investment in the minerals in place. Similarly, in *Helvering* v. *Bankline Oil Co.*, 303 U. S. 362, 367, this Court expressly pointed out the distinction between a capital investment in oil and gas in place and "a mere economic advantage derived from production, through a contractual relation to the owner". These cases clearly establish that, in considering the nature of the

provision only those who derive income directly from production and sale of the oil are entitled to depletion. Cf. *Helvering* v. *Twin Bell Oil Syndicate*, 293 U. S. 312.

Oklahoma Company's rights, the fact that the value of its contract depended in part upon whether there was sufficient oil in place to pay the $110,000 is immaterial; exhaustion of the properties before the payments were completed might have made the contract less advantageous to the Oklahoma Company, but this consideration by itself cannot serve to transmute what would otherwise be a contractual right into a capital investment.

While from an economic standpoint there may seem to be but a narrow distinction between a capital investment in the oil and gas in place, such as was deemed to be involved in *Palmer* v. *Bender* and *Thomas* v. *Perkins*, and a "mere economic advantage derived from production, through a contractual relation to the owner," such as is involved in this case and as was involved in the *O'Donnell*, *Elbe*, and *Bankline* cases, it is upon the basis of this distinction that the law has thus far been developed by this Court. Unless *Thomas* v. *Perkins* and that aspect of *Palmer* v. *Bender* which relates to oil payments (as distinguished from royalty payments) are to be reexamined, this distinction must, we submit, be deemed controlling.

5. A final word should be said about petitioners' contention that Prichard acted as a mere instrumentality or agency for collecting, receiving, and paying over to the Oklahoma Company money which belonged to it, and that he may not, therefore, be taxed with respect to such money. This contention is necessarily based on the premise that the Okla-

homa Company reserved an interest in the oil in place so that a portion of the proceeds from that oil belonged to it; so viewed, the contention has been answered by what has already been said. Moreover, it is clear that Prichard's agreement to pay the Oklahoma Company $110,000 out of one-half of the proceeds of the properties could not serve to convert him into a trustee, agent, or attorney in fact for the Oklahoma Company and thus exempt him from the tax; as we have pointed out (*supra*, pp. 10–11), a person who receives income from property owned by him is taxable thereon whatever anticipatory arrangement he may have made to deal with the income after he receives it. *Helvering* v. *Clifford*, No. 383, present Term; *Reinecke* v. *Smith*, 289 U. S. 172, 177; *Lucas* v. *Earl*, 281 U. S. 111; *Burnet* v. *Leininger*, 285 U. S. 136.[8]

[8] The cases cited by petitioner are all distinguishable on their facts and many of them are of doubtful authority. *Shellabarger* v. *Commissioner*, 38 F. (2d) 566 (C. C. A. 7th), has been limited to its own peculiar facts by the court which decided it (*Sarther Grocery Co.* v. *Commissioner*, 63 F. (2d) 68, 69 (C. C. A. 7th)) and the Court of Claims expressly declined to follow it. *Brewster* v. *United States*, 9 F. Supp. 686, 688. The decisions of the Circuit Court of Appeals for the Eighth Circuit in *Bettendorf* v. *Commissioner*, 49 F. (2d) 173, and *Central Life Assur. Soc. Mut.* v. *Commissioner*, 51 F. (2d) 939, have been greatly limited, if not overruled in principle, by that same court. *Marquette Oil Distribution Co.* v. *Commissioner*, 73 F. (2d) 205, 211. Moreover, the subsequent decision of the Circuit Court of Appeals for the Eighth Circuit in *Conar Oil Co.* v. *Burnet*, 64 F. (2d) 965, demonstrates that that court does not believe that the *Bettendorf* and *Central Life Assurance* cases are applicable to the type of situation here presented.

CONCLUSION

The decision of the court below should be affirmed.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES.

Nos. 682, 683.—October Term, 1939.

J. Steve Anderson, Petitioner, 682 *vs.* Guy T. Helvering, Commissioner of Internal Revenue. L. H. Prichard, Petitioner, 683 *vs.* Guy T. Helvering, Commissioner of Internal Revenue.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[May 20, 1940.]

Mr. Justice Murphy delivered the opinion of the Court.

Oklahoma City Company in 1931 owned certain royalty interests, fee interests, and deferred oil payments in properties in Oklahoma. During that year it entered into a written contract with petitioner Pritchard providing for the conveyance to him of these interests for the agreed consideration of one hundred sixty thousand dollars, payable fifty thousand in cash and one hundred ten thousand from one-half of the proceeds received by him which might be derived from oil and gas produced from the properties and from the sale of fee title to any or all of the land conveyed. Interest at the rate of 6% per annum was to be paid from the proceeds of production and of sales upon the unpaid balance. Oklahoma Company was to have in addition a first lien and claim against "that one-half of all oil and gas production and fee interest . . . from which the $110,000 is payable", the lien and claim "not in any way to affect the one-half interest in all oil and gas production and fee interest or the revenue therefrom which . . . [it] is to have and receive under this agreement." The proceeds derived from the oil and gas produced and from sales of the fee interests were to be paid directly to Pritchard who was to deposit one-half of them at a designated bank, at intervals of 90 days, to the credit of Oklahoma Com-

pany. The agreement recited that Oklahoma Company desired "to sell all of its right, title and interest of whatsoever nature" in the described properties, and provided that a copy of the agreement and a release be placed in escrow for delivery to Pritchard upon payment in full of the one hundred ten thousand dollars and interest. Immediately upon the execution of the contract the properties were conveyed to Pritchard without reservation.[1] In entering into the agreement Pritchard acted not only for himself but also for petitioner Anderson, each of them having a 45% interest.[2]

The gross proceeds derived from the production and sale of oil from the properties[3] during 1932 amounted to some eighty one thousand dollars. Pritchard, upon receiving this sum, distributed one-half to Oklahoma Company pursuant to the contract. The question for decision is whether the proceeds thus paid over to Oklahoma Company should be included in the gross income of petitioners for the tax year 1932.[4] The ruling of the Board of Tax Appeals against petitioners was affirmed by the Circuit Court of Appeals, 107 F. (2d) 459. Because of an asserted conflict with the applicable decisions of this Court, we granted certiorari, March 4, 1940.

It is settled that the same basic issue determines both to whom income derived from the production of oil and gas is taxable and to whom a deduction for depletion is allowable. That issue is, who has a capital investment in the oil and gas in place and what is the extent of his interest. *Helvering* v. *Bankline Oil Co.*, 303 U. S. 362, 367; *Helvering* v. *O'Donnell*, 303 U. S. 370; *Helvering* v. *Elbe Oil*

1 Petitioners state that "the instruments of transfer of those properties were absolute and unqualified assignments and conveyances" and that there was "no reservation of any sort of interest, much less any legal interest specified in those assignments and conveyances".

2 The remaining 10% interest was acquired for one Olsen, whose case was consolidated with those of Pritchard and Anderson, and disposed of in the same opinion below, but who has not sought review here.

3 The record does not indicate what portion of the gross proceeds was derived from the production and sale of oil and gas and what portion, if any, was derived from sales of fees and from royalties on leases. The Commissioner in determining deficiencies against petitioners, however, added $11,276.39 to the gross income of each with the explanation that this amount represented "Oil payments received in connection with the Patterson [Oklahoma Company] Deal" not reported by petitioners. Respondent, in view of this explanation by the Commissioner and the omission from the record of any disclosure of the method of computing the $11,276.39 addition to gross income, accepts petitioners' statement that "the only income from the properties here in dispute is from oil production".

4 Revenue Act of 1932, C. 209, 47 Stat. 169.

Co., 303 U. S. 372; *Thomas* v. *Perkins*, 301 U. S. 655, 661, 663; *Helvering* v. *Twin Bell Oil Syndicate*, 293 U. S. 312, 321; *Palmer* v. *Bender*, 287 U. S. 551. Compare *Helvering* v. *Clifford*, No. 383, October Term, 1939.

Oil and gas reserves like other minerals in place, are recognized as wasting assets. The production of oil and gas, like the mining of ore, is treated as an income-producing operation, not as a conversion of capital investment as upon a sale, and is said to resemble a manufacturing business carried on by the use of the soil. *Burnet* v. *Harmel*, 287 U. S. 103, 106-107; *Bankers Coal Co.* v. *Burnet*, 287 U. S. 308; *United States* v. *Biwabik Mining Co.*, 247 U. S. 116; *Von Baumbach* v. *Sargent Land Co.*, 242 U. S. 503, 521, 522; *Stratton's Independence* v. *Howbert*, 231 U. S. 399, 414. The depletion allowed by production is likened to the depreciation of machinery or the using up of raw materials in manufacturing. *United States* v. *Ludey*, 274 U. S. 295, 302-303; *Lynch* v. *Alworth-Stephens Co.*, 267 U. S. 364, 370. Compare *Von Baumbach* v. *Sargent Land Co.*, *supra*, at 524-525. The deduction is therefore permitted as an act of grace and is intended as compensation for the capital assets consumed in the production of income through the severance of the minerals. *Helvering* v. *Bankline Oil Co.*, 303 U. S. 362, 366-367. The granting of an arbitrary deduction, in the interests of convenience, of a percentage of the gross income derived from the severance of oil and gas, merely emphasizes the underlying theory of the allowance as a tax-free return of the capital consumed in the production of gross income through severance. *Helvering* v. *Twin Bell Oil Syndicate*, 293 U. S. 312, 321; *United States* v. *Dakota-Montana Oil Co.*, 288 U. S. 459, 467.

The sole owner and operator of oil properties clearly has a capital investment in the oil in place, if anyone has, and so is taxable on the gross proceeds of production and is granted a deduction from gross income as compensation for the consumption of his capital. See *Burnet* v. *Harmel*, *supra*, at 107-108; *Helvering* v. *Clifford*, No. 383, October Term, 1939. By an outright sale of his interest for cash, such an owner converts the form of his capital investment, severs his connection with the production of oil and gas and the income derived from production, and thus renders inapplicable to his situation the reasons for the depletion allowance. "The words 'gross income from the property,' as used in the statute governing the

allowance for depletion, mean gross income received from the operation of the oil and gas wells by one who has a capital investment therein,—not income from the sale of the oil and gas properties themselves." *Helvering* v. *Elbe Oil Land Co.*, 303 U. S. 372, 375-376.

Other situations, falling between the two mentioned, have been put on one side or the other as the cases arose. The holder of a royalty interest—that is, a right to receive a specified percentage of all oil and gas produced during the term of the lease—is deemed to have "an economic interest" in the oil in place which is depleted by severance. *Palmer* v. *Bender*, 287 U. S. 551, 557; *Murphy Oil Co.* v. *Burnet*, 287 U. S. 299; *Burnet* v. *Harmel*, 287 U. S. 103. See *Lynch* v. *Alworth-Stephens Co.*, 267 U. S. 364. Cash bonus payments, when included in a royalty lease, are regarded as advance royalties, and are given the same tax consequences. *Burnet* v. *Harmel*, 287 U. S. 103; *Murphy Oil Co.* v. *Burnet*, 287 U. S. 299; *Bankers Pocahontas Coal Co.* v. *Burnet*, 287 U. S. 308. Compare *Helvering* v. *Elbe Oil Land Co.*, 303 U. S. 372, 375. A share in the net profits derived from development and operation, on the contrary, does not entitle the holder of such interest to a depletion allowance even though continued production is essential to the realization of such profits. *Helvering* v. *O'Donnell*, 303 U. S. 370; *Helvering* v. *Elbe Oil Co.*, 303 U. S. 372. Similarly, the holder of a favorable contract to purchase wet gas at the mouth of the well is denied a depletion allowance on the difference between the contract price and the fair market value. *Helvering* v. *Bankline Oil Co.*, 303 U. S. 362. Such an interest has been characterized by us as a "mere economic advantage derived from production, through a contractual relation to the owner". *Helvering* v. *Bankline Oil Co.*, *supra*, at 367.

Thomas v. *Perkins*, 301 U. S. 655, relied upon by petitioners, presented the issue whether the right to oil payments—that is, the right to a specified sum of money, payable out of a specified percentage of the oil, or the proceeds received from the sale of such oil, if, as and when produced—should be treated for tax purposes like the right to oil royalties or like the right to cash payments upon a sale. In that case, the assignment of lease provided for payments in oil only without the reservation of a royalty interest. The question was whether the assignees' gross income should include moneys paid to the assignors by purchasers of the oil. We stated (p. 659): "The granting clause in the assignment would be sufficient, if standing

alone, to transfer all the oil to the assignee. It does not specifically except or exclude any part of the oil. But it is qualified by other parts of the instrument. The provisions for payment to assignors in oil only, the absence of any obligation of the assignee to pay in oil or in money, and the failure of assignors to take any security by way of lien or otherwise unmistakably show that they intended to withhold from the operation of the grant one-fourth of the oil to be produced and saved up to an amount sufficient when sold to yield $395,000." Under these circumstances, the moneys received by the assignors from the sale of the oil were deemed not to be income to the assignees. See also *Palmer* v. *Bender*, 287 U. S. 551.

The holder of an oil payment right, as an original proposition, might be regarded as having no capital investment in the oil and gas in place. The value of the right, even though dependent upon the extent of the oil reserves, is fixed at the moment of creation and does not vary directly with the severance of the mineral from the soil. In this sense it resembles the right to cash payments more closely than the right to royalty payments. Yet it does depend upon the production of oil, ordinarily can be realized upon only over a period of years, and permits of a simple and convenient allocation between lessor and lessee of both the gross income derived from production and the allowance for depletion. Compare *Burnet* v. *Harmel*, 287 U. S. 103, 106-107. Accordingly, this Court in *Thomas* v. *Perkins* decided that the provision in the lease for payments solely out of oil production should be regarded as a reservation from the granting clause of an amount of oil sufficient to make the agreed payments, and should be given the same tax consequences as a provision for oil royalties. The decision did not turn upon the particular instrument involved, or upon the formalities of the conveyancer's art, but rested upon the practical consequences of the provision for payments of that type. See *Palmer* v. *Bender*, 287 U. S. 551, 555-557; *Burnet* v. *Harmel*, 287 U. S. 103, 111.

The Government maintains that the present case is distinguishable from *Thomas* v. *Perkins* for the reason that the basis for decision there was that ownership of sufficient oil to make the payments had not been conveyed to the assignee but remained in the assignor. It asserts that the terms of the contract and the instruments of conveyance here negative any intention on the part of the parties to

withhold from the operation of the grant an amount of oil equal to the oil payments. The following factors, among others, are relied upon as supporting this contention: (1) the contract contains no qualifying language reserving from the grant any interest in the oil and gas in place; (2) the deferred payments of one hundred ten thousand dollars were payable in cash and not directly in oil; (3) the deferred payments drew interest until paid; (4) Oklahoma Company had a first lien and claim against one-half of the oil and gas production and fee interest; (5) petitioner Pritchard had the right to sell the fee interest covered by the contract and discharge the deferred payments out of the proceeds of such sale rather than out of the proceeds of the oil and gas production.

Several of the distinctions urged upon us by the Government are without substance. The economic consequences of the transaction are not materially affected by the circumstance that the provision for oil payments is not phrased in terms of a reservation from the conveyance to Oklahoma Company of an interest in the oil and gas in place. And the fact that the payments to Oklahoma Company are in cash rather than directly in oil is of no moment in determining the issues presented for decision. Compare, however, *General Utilities Co.* v. *Helvering*, 296 U. S. 200. Similarly, the retention of a lien, if it were construed as a lien only upon the oil and gas production, and nothing more,[5] would not make Oklahoma Company any the less dependent upon such production for payment of the amounts reserved.

The reservation of an interest in the fee, in addition to the interest in the oil production, however, materially affects the transaction. Oklahoma Company is not dependent entirely upon the production of oil for the deferred payments; they may be derived from sales of the fee title to the land conveyed. It is clear that payments derived from such sales would not be subject to an allowance for depletion of the oil reserves, for no oil would thereby have been severed from the ground; an allowance for depletion upon the proceeds of such a sale would result, contrary to the purpose of Congress, in a double deduction—first, to Oklahoma Company, second, to the vendee-owner upon the production of oil. *Helvering* v. *Twin Bell Oil Syndicate*, 293 U. S. 312, 321. We are of opinion

[5] The lien here appears to cover both the oil and gas production and the fee interest from which the deferred payments were to be derived.

that the reservation of this additional type of security for the deferred payments serves to distinguish this case from *Thomas* v. *Perkins*. It is similar to the reservation in a lease of oil payment rights together with a personal guarantee by the lessee that such payments shall at all events equal the specified sum. In either case, it is true, some of the payments received may come directly out of the oil produced. But our decision in *Thomas* v. *Perkins* does not require that payments reserved to the transferor of oil properties shall for tax purposes be treated distributively, and not as a whole, depending upon the source from which each dollar is derived. An extension of that decision to cover the case at bar would create additional, and in our opinion unnecessary, difficulties to the allocation for income tax purposes of such payments and of the allowance for depletion between transferor and transferee. In the interests of a workable rule, *Thomas* v. *Perkins* must not be extended beyond the situation in which, as a matter of substance, without regard to formalities of conveyancing, the reserved payments are to be derived solely from the production of oil and gas. The deferred payments reserved by Oklahoma Company, accordingly, must be treated as payments received upon a sale to petitioners, not as income derived from the consumption of its capital investment in the reserves through severance of oil and gas.

Petitioners, as purchasers and owners of the properties, are therefore taxable upon the gross proceeds derived from the oil production, notwithstanding the arrangement to pay over such proceeds to Oklahoma Company. See *Helvering* v. *Clifford*, No. 383, October Term, 1939; *Reinecke* v. *Smith*, 289 U. S. 172, 177; *Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.